Supreme Court, U.S.
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OFFICE OF THE CLERK

No._____

In The

Supreme Court of the United States

October Term, 2000

***In re* THOMAS M. RETTIG**

Petition For Common Law Writ of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR COMMON LAW WRIT OF CERTIORARI

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185 pp

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Sixth Circuit accord petitioner the review of his rights under (1) the Fifth Amendment to the U.S. Constitution and under the Education For All Handicapped Children Act of 1975, as upheld in *Rowley,* and (2) under the Rehabilitation Act of 1973, as amended?

2. Is the petitioner entitled to relief from this Court because no court reviewed his claims that in 1979 and in 1983 and in 1987 respondent Board of Education of the State of Ohio unlawfully denied him due process under the Fourteenth Amendment to the U. S. Constitution and under the Education For All Handicapped Children Act of 1975, as upheld in *Rowley,* to access (1) the *free appropriate public education* under the Fourteenth Amendment to the U.S. Constitution and under the Education For All Handicapped Children Act of 1975, as upheld in *Rowley*; and (2) the *nonacademic services* under Part 84.37 implementing § 504 of the Rehabilitation Act of 1973, as amended?

3. Is the petitioner entitled to relief from this Court because no court reviewed his claim that, for the years 1970-2001, respondents Board of Education of the State of Ohio and Kent City School District unlawfully denied him (1) the *free appropriate public education* under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution and under the Education For All Handicapped Children Act of 1975, as upheld in *Rowley*, and (2) the *nonacademic services* under the Rehabilitation Act of 1973, as amended?

LIST OF ALL PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Thomas M. Rettig, Plaintiff-Appellant;
Eva O. Rettig, Plaintiff-Appellant;

v.

The Kent City School District;
Donna G. Lightel;
Michael J. Chrin;
Board of Education of the State of Ohio;
Frankllin B. Walter, Defendants-Appellees.

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PETITION FOR COMMON LAW WRIT OF CERTIORARI

Petitioner respectfully prays that a common law writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Decision of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The Opinion of the United States district court appears at App B to the petition and is unpublished.

JURISDICTION

On 11/05/99 the court of appeals denied rehearing. App C. This Court denied certiorari and rehearing. This Court denied petitioner its process in forma pauperis and dismissed his petition for common law writ; and rehearing. On 03/19/01, without reaching its merits, his petition for writ of common law was dismissed; and Rettig was ordered off this Court's pauper docket. App G-75. He firmly believes that he is entitled to relief. The jurisdiction of this Court is invoked under 28 USC § 1651(a) *writs*.

CONSTITUTIONAL AND STATUTORY PROVISIONS

US CONSTITUTION, FIFTH AMENDMENT

No person shall ... be deprived of life, liberty, or property, without due process of law; ...

US CONSTITUTION, FOURTEENTH AMENDMENT

Section 1. ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

20 USC §§ 1400, *et seq., The Education for All Handicapped Children Act of 1975*. (EHA, as amended in 1975, and 1986).

§ 1401(18) The term "free appropriate public education" means *special* education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under § 614(a)(5).

§ 614...(a)...(5) provide assurances that the local educational agency will establish, or revise, whichever is appropriate, an individualized education program for each child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually.

§ 1415(e)(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

§ 1415(f) Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (b)(2) and (c) shall be exhausted to the same extent as would be required had the action been brought under this part. (1986 amendment).

THIS COURT REQUIRES THE FOLLOWING REVIEW TEST:

Therefore, a court's inquiry in suits brought under § 1415(e)(2 is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably

calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.
Hendrick Hudson Dist Bd of Ed v. Rowley, 458 US 176, 206-07. (1982).

Further, App F to this petition contains the text of 29 USC § 794. *Nondiscrimination under Federal grants* (Rehabilitation Act of 1973, as amended); the text of Part 84.1 *Purpose*; 84.3 *Definitions; 84.36 Procedural safeguards; 84.37 Nonacademic services;* 84.38 *Preschool and adult education programs;* all implementing § 504 of the Rehabilitation Act of 1973, as amended; and a copy of *APPENDIX B* to OH's 06/20/77 EHA State Plan/Application for federal funds which OH filed with the Office for Civil Rights.

STATEMENT OF THE CASE

Petitioner Thomas Matthias Rettig (Rettig) is a young man who was born with infantile autism. When a *handicapped child* of school age, respondents Kent City School District (Kent) and Board of Education of the State of Ohio (OH) denied him the *free appropriate public education (FAPE)* under the Education for All Handicapped Children Act of 1975 (EHA), and the *nonacademic services* under Part 84.37 implementing § 504 of the Rehabilitation Act of 1973, as amended. (Hereafter, benefits).

Rettig's parents rejected what Kent/OH proposed and provided him because it never met OH's *program standards for special education.* Prior to the EHA, OH's *procedures* could only be initiated by Kent. Because Kent denied him the *procedures*, he had no way to reach OH. However, Kent/OH received federal funds during the pre-EHA period.

Under the EHA, Rettig was before OH in 1978-1979, and in 1982-1983, and in 1986-1987. At no time--not in 1979, and not in 1983, and not in 1987--did OH ever "comply with the procedures set forth in the Act." In 1979 OH enacted OH-79 which affirmed 1970-1979 Kent and required no prospective changes for Rettig; and in 1983

OH enacted OH-83 which affirmed 1979-1983 Kent and required no prospective changes for Rettig, and OH-83 affirmed 1979-1983 Kent and required no prospective changes for him; and OH-87 affirmed 1983-1987 Kent, and created the non-substance for Rettig since 1987. In sum, whatever Rettig received or didn't receive 1970-2001 was from Kent/OH.

FAPE's definition consists of a check-list. *Rowley.* When applied to Kent/OH's version of Rettig's schooling, that check-list reveals the fact that Kent/OH refused him the *Individualized Educational Program* required for him in order to *enable the child to receive educational benefits.*

For the years 1970-1974 Kent/OH denied Rettig the *FAPE; and benefits.* In 1970, Kent/OH denied him the *diagnosis;* and *determination of eligibility* for placement under OH's *Program Standards for Special Education and Legal Dismissal from School Attendance.* (1966). No written *child study* exists for Rettig. For the years 1970-1974, Rettig attended private nursery schools. The substance he received there failed to meet the requirements of OH's *Program Standards for Special Education.* (1966; and 1973) *See* Administrative Record; and

For the years 1974-1978 Kent/OH denied Rettig the *FAPE;* and benefits. He attended Kent/OH's *program for Severely and/or Multiply Impaired Children* (*SMI*) which was housed on the campus of Kent State University. Kent/OH denied him the *pre-placement evaluation*; and the *educational program* consisting of the two components (1) *treatment plan* redressing autism, and (2) *instructional plan* providing for the specific special education and related services necessary to meet Rettig's needs which were to have been identified by the *pre-placement evaluation* required under OH's *Plan for the Education of the Handicapped* adopted in 1973. Admin Rec. In 1976, OH adopted its *Standards for Due Process and Procedural Safeguards for Handicapped Children and Youth* (Admin. Record) requiring *annual written placement team conference reports* which were to have developed the educational program that reflects both educational and treatment components required under OH's 1973 Plan. No such report exists for Rettig. In 1977, OH

adopted its *Standards for Multi-Factored Evaluation. (M-FE).* Admin Rec. No *M-FE* meeting that standard exists for Rettig; and

For the years 1978-1981 Kent/OH denied Rettig the *FAPE;* and benefits. He attended Kent/OH's SMI program at Kent's Longcoy Elementary School. The *MF-E* does not exist; and no *written placement team conference report* exists which would have provided Rettig's plan to treat autism and redress instruction; and

For the years 1981-1987 Kent/OH denied Rettig the *FAPE;* and benefits. He attended Kent/OH's *SMI program* at Kent's Theodore Roosevelt High School. In 1981, Kent evaluated Rettig. Kent/OH denied him the treatment plan his identified needs required. His primary handicap -autism- was ignored, and the required *annual written placement team conference reports* do not exist for <u>any</u> of the years; and

For the years since 1987 Kent/OH has been denying Rettig the *FAPE;* and benefits under the guise of "graduation." OH's 1979 decision (OH-79) required Rettig to stay where Kent/OH put him for the years 1970-2001. § 1415(e)(3). Since 1979, Rettig has been seeking court review of his claims and enforcement of his federal rights.

The courts have denied him the Constitutional/EHA/*Rowley* review test which this Court specifically requires for him.

(I.) The merits of Rettig's 1979 EHA due process and 1970-1979 equal protection claims were not reviewed by the 1979-1986 courts. The courts unfairly sustained Kent/OH's violations of the EHA and Rehabilitation Act.

On 03/01/78 Rettig, by and through his mother, formally demanded of Kent/OH his EHA access right to the *FAPE* and benefits, and compensatory *FAPE* and benefits for substandard years 1970-1978. Kent refused. On 11/12/79, OH created OH-79 which affirmed Kent's 1970-1979 substance and denied him the EHA's prospective access to the *FAPE* and benefits. Admin Rec. OH-79 triggered the EHA's "stay-put" provision which remains in effect until the court finally lifts it after the required Constitutional/EHA/*Rowley*

review.

(A.) Rettig filed complaint #C79-2234, demanding review of OH-79 and access to the *FAPE* and benefits; and 1970-1979 compensatory *FAPE* and benefits. The US District Court's (DC) 08/21/81 Opinion pre-dated *Rowley.* (1982). On its face, the Opinion (1) did not review OH-79 to determine his EHA due process right and his 1970-1979 equal protection claims, and refused to require Kent/OH to accord him EHA access; and 1970-1979 compensation; and (2) ordered Kent to provide him one hour/week *extracurricular activities.* App G-8.

Rettig appealed (1); and Kent appealed (2). On 11/08/83 the US Court of Appeals for the Sixth Circuit (CA6) filed its Decision. Although citing the *Rowley* review test, it did not answer the required questions, namely: First, in 1979 did OH accord Rettig access to the then future *FAPE* and benefits?, and Second, did the years 1970-1979 meet the requirements of the check-list which defines *FAPE?* App G-35. Without the required answers, it unfairly sustained Kent/OH in their denials of Rettig's EHA and Rehab Act rights. It vacated, and remanded, in light of *Rowley,* the issue of *extracurricular activities* which Kent had won on appeal. App G- 39. Rettig appealed the CA(6)'s denial of EHA review due him to this Court where his appeal was taken as a petition for writ of certiorari. Certiorari and rehearing were denied. Rettig's appeal was futile. This Court upheld Kent/OH's violations of federal law. App G-40.

(B.) On 01/26/84 the DC decided the remanded issue. On its face, the Memorandum did not review OH-79 which had denied Rettig due process access to the benefits; but it required the benefit for Rettig. It found the years 1970-1979 moot. App G-45.

Kent appealed. Rettig cross-appealed, demanding review of OH-79 in light of OH's 06/20/77 *ASSURANCE OF COMPLIANCE WITH PART 84.* This document was DHEW-required *Appendix B* to OH's State Plan/Application for EHA funds. App F-4. On 03/10/86 the USCA(6) filed its Decision. On its face, it did not review OH-79 to determine his access right to the benefits. It reversed the DC on mootness; App G-50; but did not review the years 1970-1979. In his cross-appeal, Rettig demanded review of OH-79 which had denied

him due process access to the *FAPE* and benefits, and of the 1970-1979 equal protection denials of the *FAPE* and benefits. His cross-appeal was dismissed. App G-54. The CA(6) unfairly sustained Kent/OH in their 1970-1979 violations of the EHA and Rehab Act. App G-54.

This Court denied certiorari to Rettig. His appeal was futile. This Court upheld Kent/OH's violations. App G-55.

(II.) The merits of Rettig's 1983 EHA due process right and his 1979-1983 equal protection rights were not reviewed by the C83-2881 district court. It unfairly sustained Kent/OH's additional 1979-1983 EHA and Rehab Act violations.

In 1981, the DC ordered Kent to conduct the *M-FE* required for Rettig under the EHA. App G-30. Kent refused, and conducted its own version. On 09/29/82 Rettig filed his *admin complaint*, demanding to challenge Kent's 1981 evaluation for lack of treatment plan and absence of the *annual written placement team conference reports* which were to have prescribed the type and degree of special education and related services due Rettig. Kent objected, insisting on "Stay-Put" because of the appeals pending in the CA(6). The local hearing officer (HO) ordered Kent to provide Rettig the *placement team conference* required after the *MF-E* under OH's standards. Kent refused, and appealed to OH. Rettig cross-appealed, demanding review and access to the *FAPE* and benefits and additional 1979-1983 compensation. Admin Rec. On 06/13/83 OH created OH-83. It denied him prospective EHA access to the *FAPE* and benefits; and affirmed Kent/OH's 1979-1983 denials of *FAPE* and benefits. OH-83 required Rettig to stay put. § 1415(e)(3). Admin Rec.

Rettig filed his complaint #C83-2881. He demanded review of OH-83 and his then new 1979-1983 EHA and benefits equal protection claims. He demanded EHA access to his 1983 *FAPE* and benefits; and compensation for Kent/OH's additional 1979-1983 denials of equal protection. Kent/OH moved to dismiss, insisting on the pending appeals in the CA(6). Rettig moved to amend to include the years 1983-1987. Kent/OH objected. On 10/23/86 the DC entered Judgment for Kent/OH under Rule 12(b)(6), FRCP. App G-56. On

its face, that Judgment's basal Opinion did not review OH-83 to determine Rettig's 1983 due process right; and his 1979-1983 equal protection claims were not reviewed. Therefore, the Judgment is void. Any appeal would have been as futile as those cited above. App G-57.

(III.) The merits of Rettig's 1979, and 1983, and 1987 EHA due process and 1970-1987 EHA and Rehab Act equal protection claims were not reviewed by the 1987-1993 courts. The courts unfairly sustained Kent/OH's 1970-1987 EHA and Rehab Act violations.

On 12/12/86 Rettig filed his *admin complaint* that, *(A) OH-79 unlawfully denied him due process access to the 1979-1983 FAPE and benefits, and Kent/OH unlawfully denied him 1970-1979 equal protection under the EHA and Rehab Act; and (B) OH-83 unlawfully denied him due process access to the 1983-1987 FAPE and benefits; and Kent/OH unlawfully denied him 1979-1983 equal protection under the EHA and Rehab Act.* The HO granted Kent's motion to dismiss the local hearing. Admin Record.

Rettig appealed to OH. While his appeal was pending, Kent, by its rite of graduation, dismissed Rettig from school attendance. Rettig demanded of OH access to the Part 84.38 *adult education program*, and Part 84.37 benefits, and compensation for 1970-1987. On 07/13/87 OH created OH-87. OH-87 affirmed Kent/OH's 1970-1987 unlawful denials of his EHA and Rehab Act equal protection rights, and unlawfully denied him his access right to the Part 84. benefits until the conclusion of his case against Kent/OH, and in violation of 1415(e)(3), forced him out of Kent/OH's system which receives federal assistance. Admin Rec.

(1.) Rettig filed his C87-3492 complaint. He brought his 12/12/86 *admin complaint re: (A),* and *(B), above,* and added *(C) that OH-87 affirmed Kent/OH's 1983-1987 unlawful denials of equal protection, and unlawfully denied him due process access to the Part 84. benefits* after 1987. He demanded a comprehensive remedy, including access to the Part 84. benefits and injunctive relief as compensation for the wrong done him 1970-1987. Kent/OH moved to dismiss.

On 07/28/89 the DC granted Kent/OH's motions. It

dismissed Rettig's complaint under Rule 12(b)(6), FRCP. Its basal Memorandum did not review the merits of Rettig's rights re: (A), and (B), and (C); but unfairly relied on the unfair court reviews discussed above. Therefore, the DC's 07/28/89 dismissal Order is void. The DC denied all post-judgment relief, including a new trial. App E.

Rettig appealed the DC's void 07/28/89 Order and Memorandum and Order to the CA(6). On 08/29/90 the CA(6) filed its Decision. On its face, it did not review the merits of (A), and (B), and (C), above. It unfairly affirmed the unfair DC Order, and unfairly added mootness to the DC's list of legal doctrines which are misapplied to Rettig's EHA case. App D.

This Court denied certiorari and rehearing. Rettig's appeal was futile. This Court sustained Kent/OH's violations. App G-61,62.

(2.) Since appeal had been futile, Rettig filed in the CA(6) a mandamus petition against the C87-3492A DC. On 08/07/91 it was denied. App G-64.

This Court also denied Rettig's mandamus petition against the DC. Further, while his petition for rehearing was pending, he submitted an application for relief. It was returned. Rehearing was denied. This Court upheld Kent/OH's EHA and Rehab Act violations. App G-64,65,66.

(3.) Since the appellate courts refused to require the DC to proceed to the merits, Rettig petitioned the CA(6) under its *original jurisdiction* to require Kent/OH to *restore* his due process and equal protection rights. The CA(6) denied his petition. App G-68.

This Court also denied Rettig's petitions for mandamus against Kent/OH, and rehearing. App G-69,70.

(4.) Rettig next submitted, under this Court's *original jurisdiction*, his motion to file a bill of complaint and complaint. Both were returned. This Court unfairly upheld Kent/OH. App G-70.

(IV.) The merits of Rettig's 1979, and 1983, and 1987 due process, and 1970-2001 EHA and Rehab Act equal protection claims were not reviewed by the 1994-2001 courts. This court unfairly sustains Kent/OH's 1970-2001 EHA and Rehab Act violations.

On 07/29/94 Rettig filed in the DC his Motion for relief under

Rule 60(b)(4), FRCP, *the judgment is void,* from the DC's void 08/29/89 Order dismissing his complaint #C87-3492A. Docket, # 35. Kent/OH opposed. On 09/08/94 the DC filed its Memorandum denying the motion. #41. On 09/14/94 Rettig timely filed his motion *to alter or amend a judgment.* Rule 59(e), FRCP. #42. On 10/13/94 the DC entered a marginal order denying #42. Rettig timely asked the DC to reconsider #42 which kept pending. As the docket shows , the DC entered no *one-page Order from which an appeal lies* under Rule 54, FRCP, *Judgments; Involving Multiple Parties.* Docket. On 10/14/97 the DC finally entered its "appealable" one-page Order. The Order was based on the Memorandum filed that same day. On its face, the Memorandum did not determine Rettig's EHA and Rehab Act rights. It unfairly dismissed them under mootness, and unfairly upheld Kent/OH's EHA and Rehab Act violations. Therefore, the Judgment is void. App B.

Rettig appealed the DC's 10/14/97 Order and Memorandum. On 08/12/99 the CA(6) filed its Decision. On its face, it did not determine the merits of Rettig's EHA and Rehab Act rights. It unfairly found them moot, and affirmed the unfair Order below. App A.

The CA(6) denied rehearing en banc, and panel rehearing. App C. The lower courts unfairly sustain Kent/OH's EHA and Rehab Act violations.

On 03/20/00 this Court granted Rettig's motion for leave to proceed in forma pauperis; but denied him certioari. On 05/01/00 rehearing was denied. On 10/02/00 this Court denied his motion, and dismissed his petition for common law writ. On 11/27/00 this Court reconsidered Rettig's motion and denied it, and ignored his petition for rehearing. Because the merits of his dismissed petitions were never considered, he filed another motion and petition for common law writ. On 03/19/01 this Court ordered him off its pauper docket and left the merits of his petition unreviewed. App G-71-75.

Rettig's case is neither malicious nor frivolous. Because he firmly believes that he is entitled to redress and relief from this Court, he submits, with all due respect, the within petition for common law writ under 28 USC §1651(a).

REASONS FOR GRANTING THE PETITION

The common law writ of certiorari will be in aid of this Court's appellate jurisdiction because no court ever accorded Thomas Rettig this Court's required *Rowley* review. In violation of Rettig's Fifth Amendment right to due process of law in the courts, the courts have stripped Rettig--without the due process *Rowley* review--of his Constitutional/EHA/*Rowley* right to due process and of his substantive Constitutional/EHA/*Rowley* right to the FAPE and to the benefits under the Rehab Act.

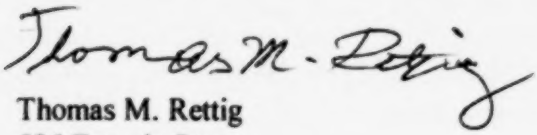
There are present exceptional circumstances warranting the exercise of this Court's discretionary powers because the federal courts unjustly sustain OH's unlawful denials of due process, and OH's and Kent's unlawful denials of equal protection. In violation of the Fourteenth Amendment, the EHA and the Rehab Act, and, for the years 1970-2001, Thomas Rettig has been denied the equal protection and has been systematically retarded, and has endured the unlawful discrimination by all named respondents. The courts bless these outrageous violations of federal law.

Adequate relief cannot be obtained in any other form or from any other court. This petition and its appendix demonstrate the futility of the process Rettig received from the federal courts. Without this Court's aid, he remains irreparably injured by the ramifications of having been systematically retarded for thirty-one (31) years by the State of Ohio's system of special education supported by federal funds.

CONCLUSION

Thomas Matthias Rettig most humbly prays that this Court grant his petition for common law writ of certiorari.

Respectfully submitted,



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APPENDIX IN SUPPORT OF PETITION FOLLOWS

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Apendix A-1

No. 97-4299

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
AUG 12 1999
LEONARD GREEN, Clerk

THOMAS M. RETTIG; EVA 0. RETTIG, Plaintiffs-Appellants	)	
v.	)	
KENT CITY SCHOOL DISTRICT; DONNA G. LIGHTEL; MICHAEL J. CHR1N; BOARD OF EDUCATION OF THE STATE OF OHIO; FRANKLIN B. WALTER, Defendants-Appellees.	)	ORDER

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 206 limits citation to specific situations. Please see rule 206 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

Before: NORRIS and SUHRHEINRICH, Circuit Judges; WEBER, District Judge.*

These pro se litigants appeal a district court judgment denying their motion for relief from a judgment filed pursuant to Fed. R. Civ. P. 59(e) and denying their motion to amend a previously filed motion for reconsideration. The case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking relief from judgment in the defendants' favor entered on

*Hon. Herman J. Weber, United States District Judge for the Southern District of Ohio, sitting by designation.

July 28, 1989, and affirmed on appeal, see *Rettig v. Kent City Sch. Dist.*, No. 89-388 1, 1990 WL 125372 (6th Cir. Aug. 29, 1990), *cert. denied*, 499 U.S. 921 (1991), Eva and Thomas Rettig moved the district court in 1997 for relief from judgment on the ground that the district court's judgment deprived Thomas Rettig of his due process rights. The Rettigs also sought to amend a motion for reconsideration which they had filed on October 27, 1994. The district court denied the Rettigs' motion for relief from judgment because it was untimely and denied the Rettigs' motion to amend their 1994 motion for reconsideration because it was moot. The Rettigs appeal.

On appeal, the Rettigs reassert six arguments pertaining to Thomas Rettig s entitlement to benefits under federal statutes pertaining to the education of handicapped children. In addition, the Rettigs move the court for "an appropriate order remanding to [the] district court," purportedly under Rule 8(b)(7), Rules of the Sixth Circuit. Defendants Donna G. Lightel, Michael J. Chrin, and the Kent City School District move the court to dismiss the matter in its entirety.

The district court properly denied the Rettigs' motion for relief from judgment because it was untimely, and the court properly denied the Rettigs' motion to amend their 1994 motion for reconsideration because it was moot. The Rettigs sought relief from judgment under Fed. R. Civ. P. 59(e). This court reviews the district court' s judgment denying a Rule 59(e) motion for abuse of discretion. See *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998); *Davis v. Jellico Community Hosp. Inc.*, 912 F.2d 129, 133 (6th Cir. 1990).

The district court did not abuse its discretion. Rule 59(e) motions must be filed within ten days after entry of judgment. Fed. R. Civ. P. 59(e). The Rettigs' moved the court for relief more than eight years after the fact.

In addition, we conclude that the district court also properly dismissed the case because it is moot.

Accordingly, all pending motions are hereby denied, and the district court's judgment is hereby affirmed pursuant to Rule 34(j)(2)(C), Rules of the Sixth Circuit, for the reasons set forth in the district court's memorandum and order of October 14, 1997.

Apendix A-3

ENTERED BY ORDER OF THE COURT

Sig

_____

Clerk

Apendix B-1

FILED
97 OCT 14 AM 10:10
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS M. RETTIG, et al.	)	Case No. C87-3492a
	)	
Plaintiffs,	)	Judge Ann Aldrich
vs.	)	
KENT CITY SCHOOL	)	
DISTRICT, et al.,	)	ORDER
	)	
Defendants.	)	

The Court has filed its memorandum and order denying Rettigs' motions for relief from this Court's July 28, 1989 judgment and to amend a 1994 motion for reconsideration. Therefore,

IT IS ORDERED that Rettigs' motions for relief from judgment entered on July 28, 1989 and to amend a motion for reconsideration filed in 1994 are denied; and the case is dismissed.

IT IS FURTHER ORDERED that this judgment is final and appealable.

Sig

ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Apendix B-2

FILED
97 OCT 14 AM 10:10
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS M. RETTIG, et al.	)	Case No. C87-3492a
	)	
Plaintiffs,	)	
vs.	)	Judge Ann Aldrich
	)	
KENT CITY SCHOOL	)	
DISTRICT, et all.,	)	
	)	MEMORANDUM
Defendants.	)	AND ORDER

Thomas and Eva Rettig move this Court for relief from judgment in the defendants' favor entered on July 28, 1989. They also move to amend a motion for reconsideration which they filed in 1994 and believe still is pending before this Court. For the reasons that follow, the motion is denied.

I.

The Rettigs brought this action challenging the education provided to Thomas, Eva's handicapped son, under 20 U.S.C. § 1401 et seq., the equal protection clause of the fourteenth amendment to the United States Constitution, and various provisions of Ohio law. Among other things, the Rettigs claimed that Thomas was denied due process in the state proceedings to determine the educational program the state would provide to Thomas.

On July 28, 1989, this Court dismissed all counts of the complaint. On August 21, 1989, this Court denied the Rettigs' motion "for a new trial" brought under Rule 59. On August 29, 1989, this Court denied the Rettigs' motion for relief from judgment brought

pursuant to 60(b). That motion had been advanced on the ground that, inter alia, the July 28 order was void, in part because the order deprived Thomas of his due process rights. On September 18, 1989, this Court denied the Rettigs' motion for reconsideration, advanced on essentially the same grounds as the previously denied motion for relief from judgment.

The United States Court of Appeals for the Sixth Circuit affirmed this Court's July 28 order in all respects on August 29, 1990. The United States Supreme Court denied the Rettigs' petition for certiorari on March 20, 1991. The Rettigs filed two petitions of mandamus with both the Sixth Circuit and the United States Supreme Court from 1991 to 1993, which were all denied.

The Rettigs filed a motion to expedite their trial on August 5, 1994. The Rettigs filed another motion for relief from judgment under Rule 60(b), which this Court denied on September 8, 1994. On September 14, 1994, the Rettigs filed a motion for amendment of findings and a new trial, which the Court denied on October 13, 1994. On October 27, 1994, the Rettigs filed a motion for reconsideration under Rule 59(e), which the Rettigs believe is currently pending. On July 22, 1996, the Court denied Rettigs' motion to expedite their trial.

Over eight years after this Court first dismissed the Rettigs' complaint, the Rettigs move yet again for relief from judgment on the ground that this Court's order deprived Thomas of his due process rights. The Rettigs also move this Court to amend the motion for reconsideration which they filed on October 27, 1994 (Docket #44). The Rettigs wish to replace mistaken references in that motion to this Court's order of September 8, 1994, with references to the Court's order of July 28, 1989.

II.

Federal Rule of Civil Procedure 59(e) provides in pertinent part:

> Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

Fed. R. Civ. P. 59(e). Here, the Rettigs bring this motion to grant relief from a judgment of this Court entered over eight years ago and to amend a motion which they filed almost three years ago. The Rettigs' motion is not timely.

In addition, the Rettigs raise claims that have been fully

litigated by both this Court and the Sixth Circuit. The issues raised in this motion are not new and were resolved years ago. The Court sympathizes with the pain Eva Rettig feels concerning Thomas' condition. However, this motion for relief from judgment states no ground on which it could be granted.

Accordingly, this motion is denied. The Rettigs' earlier motion for reconsideration, Docket #44, is denied as moot.

This order is final and appealable.

IT IS SO ORDERED.

Sig

ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Apendix C

FILED
NOV 05 1999
LEONARD GREEN, Clerk

97-4299
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS M. RETTIG;EVA O. RETTIG,	)	
	)	
Plaintiffs-Appellants,	)	
v.	)	
	)	ORDER
KENT CITY SCHOOL	)	
DISTRICT, ET AL.,	)	
Defendants-Appellees.	)	

BEFORE: NORRIS and SUHRHEINRICH, Circuit Judges; and WEBER*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Sig

Leonard Green, Clerk

*The Honorable Herman J. Weber, United States District Judge for the Southern District of Ohio, sitting by designation.

Apendix D-1

FILED
AUG 29 1990
LEONARD GREEN, Clerk

No. 89-3881

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS M. RETTIG;	) ON APPEAL
EVA 0. RETTIG,	) FROM THE
Plaintiffs-Appellants,	) UNITED STATES
v.	) DISTRICT COURT
KENT CITY SCHOOL	) FOR THE
DISTRICT; et al.	) NORTHERN
Defendants-Appellees.	) DISTRICT OF
	) OHIO

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 206 limits citation to specific situations. Please see rule 206 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

Decided and Filed

BEFORE: JONES and NORRIS, Circuit Judges; JARVIS, District Judge.*

PER CURIAM. Eva O. Retting, *(sic)* the mother of plaintiff Thomas M. Retting, *(sic)* a handicapped person, appeals the district court's order dismissing with prejudice this claim brought under the Education for All Handicapped Chidren *(sic)* Act. The district court,

*The Honorable James H. Jarvis, United States District Judge for the Eastern District of Tennessee, sitting by designation.

concluding that each of the causes of action set out in the complaint have already been fully litigated, recognized that the action was, in essence, a collateral attack upon a final judgment and, accordingly, dismissed the complaint on the basis of res judicata.

Having carefully reviewed the briefs of the parties and the record on appeal, we conclude that the district court's analysis found in its Memorandum and Order of July 28, 1989, was correct. Because we agree with the reasoning articulated by the district court as the basis for the dismissal, issuance of a written opinion by this court would be duplicative and serve no useful purpose.

Furthermore, it appears that the case is moot, since in view of Thomas' age, it appears that he is no longer entitled to the protections and benefits of the Act which limits eligibility to children between the ages of three and twenty-one years of age. Honig v. Doe, 484 U.S. 305, 318 (1988).

Accordingly, for the reasons stated, the orders of the district court dismissing the action and denying a new trial are affirmed.

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By *Sig*

_____
Deputy Clerk

ISSUED AS MANDATE: September 20, 1990
COSTS: None

Apendix E-1

FILED
1989 JUL 28 AM 11:07
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS M. RETTIG, et al.	)	
Plaintiffs	)	
	)	
vs	)	Civil Action
	)	Number C87-3492A
KENT CITY SCHOOL	)	
DISTRICT, et al.	)	
Defendants	)	ORDER

The Court has filed its memorandum and order in this case. Therefore, IT IS ORDERED that the defendants' motions to dismiss are hereby granted. IT IS FURTHER ORDERED that the complaint is hereby dismissed with prejudice, each party to bear its own costs.

Sig

ANN ALDRICH
UNITED STATES DISTRICT JUDGE

I hereby certify that this instrument is a true and correct copy of the original on file in my office. Attest: James S. Gallas, Clerk, U.S. District Court, Northern District of Ohio, By: *Sig Stamp*, Deputy Clerk.

Apendix E-2

FILED
1989 JUL 28 AM 11:07
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS M. RETTIG, et al.	)	
Plaintiffs	)	
	)	
vs.	)	
	)	Civil Action
	)	Number C87-3492A
KENT CITY SCHOOL	)	
DISTRICT, et al.	)	MEMORANDUM
Defendants	)	AND ORDER

ALDRICH, J.

This is the third in a series of federal court complaints brought by Eva Rettig on behalf of her son Thomas Rettig, a handicapped child, challenging the education provided to him under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401 et seq. (EAHCA), the equal protection clause of the United States Constitution and various Ohio state statutes and regulations. The Rettigs seek monetary damages and injunctive and declaratory relief.

Named as defendants are the Kent City School District, Donna G. Lightel, Superintendent of the Kent Public Schools, and Michael J. Chrin, Director of Child Study and Special Education for Kent Public Schools ("local defendants"). Also sued are the Board of Education for the State of Ohio and Franklin B. Walter, Superintendent of Public Instruction for the State of Ohio. ("state defendants"). Both the local and state defendants have filed motions

to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Jurisdiction over these claims is based on 28 U.S.C. § 1331. For the reasons set forth below, defendants' motions to dismiss are granted.

In reviewing the dismissal of a complaint under Fed. R. Civ. P. 12 (b)(6), this Court must construe the complaint in plaintiff 's favor and accept as true all factual allegations and permissible inferences therein. Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983), cert. denied, 469 U.S. 826 (1984) Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976). The complaint is only to be dismissed if the plaintiff could prove no set of facts in support of his claim which entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The Court need not accept as true a legal conclusion couched as a factual allegation. Papasan v. Allain, 478 U.S. 265, 286 (1986).

However, pro se complaints, such as this one, are to be liberally construed and not to be held to the same stringent standard as formal pleadings drafted by attorneys. Haines v. Kerner, 404 U.S. 519, 520 (1972).

II.

Eva Rettig is Thomas' mother. Thomas was born on May 30, 1965. Thomas displays disabilities related to autism, and is also probably mentally retarded. He has resided in the Kent School District throughout his school age years.

The following is a brief history of the litigation in which the Rettigs have challenged the education the school district has provided to Thomas. They originally filed suit on November 30, 1979, against the Kent City School District. The complaint was later amended to add as defendants Kenneth Cardinal (then Superintendent of the school district), Michael Chrin, the State Board of Education of Ohio, and the State Superintendent of Ohio. Rettig v. Kent City School District, et al., 539 F.Supp. 768 (N.D. Ohio 1981). That complaint set forth ten causes of action dealing with Thomas Rettig's Individualized Educational Program (IEP) for the school year 1978-79 and raised claims relating to the years 1970-78. The Court ruled in favor of the defendants on all but two grounds. Defendants were ordered to amend an administrative rule to be consistent with the EAHCA and to provide Thomas with one hour of extracurricular activities per week. The Court found that Thomas had been provided with a free

appropriate education and denied plaintiffs' request for seven years compensatory education.

Both the Rettigs and the Kent City School District appealed this decision. The Sixth Circuit Court of Appeals affirmed the district court's rulings in favor of the school district, vacated the decision regarding extracurricular activities and remanded to the district court in light of Board of Education v. Rowley, 458 U.S. 176 (1982). Rettig v. Kent City School District, 720 F.2d 463 (6th Cir. 1983), cert. denied, 467 U.S. 1201 (1984). On remand, the district court found that the issues involving extracurricular activities were moot but otherwise affirmed its prior judgment. Rettig, Memorandum Opinion and Order, 79-2234 (N.D. Ohio January 26, 1984). On appeal, the court of appeals reversed the trial court and found that the issue of extracurricular activities was not moot because it was capable of repetition yet could evade review. The Sixth Circuit also reversed the judgment that extracurricular activities were required for Thomas. Rettig, 788 F.2d 328 (6th Cir. 1986), cert. denied, 106 S.Ct. 3297.

In the interim, the Rettigs filed a second suit in July 1983 challenging Thomas' placement for the school year 1983-84. The Kent City School District, Lightel, Chrin, the Ohio State Board of Education and Walter were also named as defendants in that lawsuit. Rettig v. Kent City School District, C83-2881 (N.D. Ohio, Lambros, J.). The Court dismissed that action in October 1986 after giving the Rettigs an opportunity to amend their complaint to state a cause of action as to the 1986-87 school year.

In 1987, Rettigs initiated the present litigation setting forth seventeen causes of action and challenging Thomas' educational placement for 1970 to 1987. The defendants have moved to dismiss Rettigs' complaint based on res judicata, the statute of limitations, failure to exhaust administrative remedies and mootness. It is appropriate to raise the issue of res judicata by motion and in considering the motion, this Court can take judicial notice of its own records from prior cases. See, Westwood Chemical Co., Inc. v. Kulick, 656 F.2d 1224 (6th Cir. 1981); Harrington v. Vandalia-Butler Board of Education, 649 F.2d 434, 441 (6th Cir. 1981).

III.

The EAHCA mandates a "free and appropriate education" to all

handicapped children of school age. Each child's educational needs are to be provided in conformity with the child's "individualized education program" (IEP). 20 U.S.C. §1401(18). The IEP is developed by the parents and educators working together and is to state the child's present level of performance, the objectives for improvement, the means of achieving those objectives and an objective criteria for determining success. The EAHCA also requires that to the maximum extent possible, handicapped children are to be educated with those who are not handicapped. 20 U.S.C. §1412(5)(B). The statute also guarantees parents procedural safeguards, including the right to examine all relevant records relating to the identification, evaluation and educational placement of the child, and written notice of any proposed changes in the child's placement/evaluation. 20 U.S.C. §1415(b). Parents may file written complaints regarding such placements and evaluations. Upon receipt of a such a complaint, the state educational agency must provide the parents with an impartial due process hearing. Id. Once these administrative remedies have been exhausted, the parents may appeal these determinations to federal district court. 20 U.S.C. §1414(e)(1) and (2). It is the results of these administrative proceedings that form the basis for the Rettigs' lawsuit.

IV.

Under the doctrine of res judicata, a "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Federated Department Stores v. Moitie, 452 U.S. 394, 398 (1981) (citations omitted); Duncan v. Peck, 752 F.2d 1135, 1138 (6th Cir. 1985). The effects of res judicata are not altered by the fact that the judgment was in error or rested upon a legal principle which was subsequently overruled. 452 U.S. at 398. An erroneous judgment can be corrected only on direct appeal and cannot be attacked collaterally. Id. Judgments on the merits encompass both dismissals for failure to state a claim and summary judgments. Id. at n. 3; Westwood Chemical Co., Inc., v. Kulick, 656 F.2d 1224 (6th Cir. 1981).

To determine whether any two suits involve the same cause of action, courts determine the following: (1) whether the factual basis is the same in both cases; (2) whether the essential facts and issues

have been similarly presented in both cases; (3) whether the evidence will suffice to sustain both verdicts; (4) whether the same right is infringed on by the same wrong; (5) whether the wrong for which redress is sought is the same in both actions; and (6) whether the two actions are so similar that a different judgment in the second would destroy or impair rights or interests established in the first. Plazzo v. Nationwide Mutual Insurance Co., 697 F. Supp. 1437, 1443 (N.D. Ohio 1988).

The defendants have moved to dismiss all counts on the basis of res judicata. This Court is compelled to agree with defendants that all but Count V must be dismissed on the grounds of res judicata as well as for failure to exhaust administrative remedies. Count V will be addressed separately.

Count I of the complaint alleges that the impartial due process hearing which the Rettigs requested and received in 1978-79 was deficient. The Rettigs assert that the documents relating to that due process hearing were not reviewed by the district court or the court of appeals in the earlier filed case. These claims relating to review of the 1979 due process hearing were squarely raised and adjudicated in the first action between these parties. The Rettigs' first cause of action merely attempts to collaterally attack the previous decisions of this Court and the court of appeals by alleging that the courts' reviews were incomplete. As discussed earlier, res judicata specifically prevents this type of collateral attack. Furthermore, this Court is without jurisdiction to review a decision rendered by the court of appeals.

The Rettigs' second cause of action, although somewhat obscure, appears to allege that they were not provided impartial due process hearings for the years 1979-80, and 1980-81 and that this issue was not reviewed in either district court proceeding. There is nothing in the record to indicate that the Rettigs ever requested due process hearings for those years, or that such hearings were not held, or that their administrative remedies were exhausted. In fact, the Rettigs, in an exhibit, list only three requests which were made for due process hearings, none of which covered the years in question. This Court, in the first action, specially declined to reach the years 1979-80 and 1980-81 because administrative remedies had not been exhausted

as required by 20 U.S.C. §1415(e). Rettig, 539 F. Supp. at 783-84. Count XII also raises claims concerning the years 1979-80 and 1980-81 and alleges that placement decisions for Thomas violated his right to equal protection.

The Rettigs tried to raise these claims in their two previous suits. They allege that in the second lawsuit the court lacked jurisdiction because of the appeals pending before the court of appeals. If the court in these two suits erroneously declined to review those years, the proper method of attacking such decisions was by way of a direct appeal, rather than by instituting new litigation. In the first action, the district court's decision not to review those years was affirmed by the court of appeals. Rettig, 720 F.2d 463. Assuming that administrative remedies had been exhausted, these claims could have been raised in the second lawsuit. The Rettigs are now barred by the doctrine of res judicata from raising these issues. Further, it appears that these claims continue to suffer from the failure to exhaust administrative remedies, and review continues to be improper. Smith v. Robinson, 468 U.S. 992 (1984); 20 U.S.C. §1415(e).

Plaintiffs' equal protection claims brought under Counts II and XII must also be dismissed because the EAHCA provides the exclusive remedy for a child asserting the right to a free appropriate public education. Id. at 1013; Austin v. Brown Local School Dist., 746 F.2d 1161, 1164 (6th Cir. 1984), cert. denied, 471 U.S. 1053 (1985). The requirements of EAHCA cannot be circumvented by proceeding under the more general provisions of 42 U.S.C.§1983 and thus, the equal protection claims must be dismissed. Smith, 468 U.S. at 1012.

Count III alleges that the court of appeals' review of the administrative proceedings was incomplete because some exhibits were not reviewed by that court. This issue was also raised in the second lawsuit where the court held that "[a]s the district court does not exercise any review jurisdiction over higher court decisions, the undersigned Judge is without jurisdiction to pass on plaintiff's claim." Rettig, C83-2881, (N.D. of Ohio Oct.23, 1986). This Court is likewise without any authority to review and correct any errors that might have been made by the appellate court.

Count IV is a direct attack on the decision entered by the Court

in the second suit. Specifically, plaintiffs allege the following:

> The judgment entered by Judge Lambros on Oct.23,1986 failed to provide procedural due process to plaintiffs when it sustained the defendants who denied equal protection to Thomas. Plaintiff's Complaint ¶67.

This is not even an attempt on the part of the Rettigs to state a new claim. It is a blatant attempt to collaterally attack another judgment and raise issues which should have been brought before the court of appeals. This Court is without jurisdiction to hear "an appeal" from another district court. Further, the doctrine of res judicata squarely bars such a claim.

Counts VI - XI challenge various evaluations and placements of Thomas for the school years 1970 through 1977. The Rettigs allege that these placements violated various state laws and also denied Thomas equal protection. The constitutionality of Thomas' placements and evaluations for the years 1971-74 were specifically raised and rejected in previous litigation. Rettig, 539 F. Supp. 775-76. This Court will not relitigate those claims and finds them barred by the doctrine of res judicata. Claims for the years 1970, and 1975-77 are also barred. These claims could have been raised in either of the previous lawsuits. As will be discussed later, these claims are also barred by the statute of limitations.

Count XIII challenges the 1981 multifactored evaluation as violating Thomas' right to equal protection. The Rettigs objected to the evaluation at the time it was performed and "no hearing was held to override the objections filed by the parents." Complaint ¶118. The Rettigs claimed that Thomas' individualized educational programs for the years 1981-82, 1982-83, 1983-84, 1984-85,1985-86, and 1986-87 were based upon this earlier evaluation, and thus denied Thomas the free, appropriate education to which he was entitled. They allege that these actions violated Thomas' right to equal protection. As discussed earlier, this Court cannot entertain such an equal protection challenge. The Rettigs must first proceed under the EAHCA.

Count XIV involves the evaluation of Thomas which was proposed in 1984 by defendants. Initially, the Rettigs consented to the proposed evaluation of Thomas but then withdrew their consent. It is alleged that defendants then failed to institute "due process hearing

procedures to override the parental objections." Complaint ¶128. As a result, the Rettigs allege that Thomas' IEP for the years 1984-85, 1985-86, 1986-87 failed to meet specified state standards and denied him equal protection under the law. This Court cannot consider the Rettigs' equal protection claim. They must first proceed under the EAHCA. Smith, 468 U.S. 992. It is not the defendants' obligation to provide such a hearing sua sponte. Parents who object to placements or evaluations of their children must present their complaints to the superintendent who can then hold an informal hearing. If the parents are still dissatisfied, they must present a formal complaint, in writing, to the board of education. It is that complaint which triggers an impartial due process hearing. Ohio Revised Code §3323.05. Before initiating this suit relating to this 1984 evaluation, or any evaluation, the Rettigs must first exhaust their administrative remedies. 20 U.S.C. §1415(e). This has not been done and therefore count XIV must be dismissed.

Count XV alleges that since 1974 Thomas has been denied extracurricular activities which are a part of his free appropriate public education. This claim, at least through 1981, was squarely addressed and rejected by the court of appeals. Rettig, 788 F.2d at 332. The Rettigs allege that both district courts and the court of appeals failed to review this issue under the Rehabilitation Act. The court of appeals found that it was proper to limit review only to the EAHCA. Rettig, 720 F.2d 465. This Court does not have jurisdiction to review decisions made by the Sixth Circuit or by another judge of this court. Because the issue has already been raised and litigated, res judicata prevents a re-examination of the issue.

Count XVI is a "catch-all" which alleges that Thomas' placements for the years 1970 to 1987 were inappropriate in that they were based on evaluations which did not fully account for his behavior problems. This count fails for several reasons. First, issues relating to the years 1970-79 were raised and fully litigated in the first lawsuit. As to the years 1979 to 1987, those could have been addressed in the second lawsuit. Additionally, for most of the years in question, the Rettigs have failed to exhaust their administrative remedies. Only three due process hearings have been requested by the Rettigs covering the years 1978-79, 1981-82, and 1986-87. See,

Docket Entry #14 (Volume of Exhibits filed by plaintiffs 4/11/88).

Count XVII seeks an award of damages for the expenses the Rettigs have incurred in educating their son and for attorneys fees and costs. Because the Rettigs have not prevailed on any cause of action, such an award would be improper.

IV.

Defendants have also moved to dismiss Counts I - IV, VI- XIII, and XVII as barred by the statute of limitations. Because of the pro se nature of the Rettigs' complaint, it is difficult to ascertain the statutory basis for each of the above claims. These claims could be viewed as having been brought pursuant to EAHCA, 20 U.S.C. §1415, the Civil Rights Act, 42 U.S.C. §1983, or the Declaratory Judgment Act, 28 U.S.C. §§22201, 2202. None of the above statutes contains a limitations period. For each of these statutes courts are to apply the most analogous state statute. Janzen v. Knox County Board of Education, 790 F.2d 486 (6th Cir. 1986) (applying Tennessee's three year limitations period to claims under EAHCA); Owens v. Okure, 109 S. Ct. 573 (1989); and Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098 (6th Cir. 1986) (declaratory judgments). The equal protection claims under §1983 need not be addressed because of the exclusive nature of the remedy under the EAHCA.

Local defendants argue that the appropriate limitations period for the claims under EAHCA is Ohio's fifteen day period governing appeals from agency determinations. O.R.C. §119.12. In Janzen, the court of appeals firmly rejected adoption of Tennessee's 60 day limitations period for appeal from agency determinations. 790 F.2d at 488. The court found such a short limitations period to be insufficient to protect important federal rights. The court of appeals also rejected the use of Tennessee's one year statute of limitations. Id. Accordingly, this Court finds the proposed fifteen day limitation period to be insufficient.

The state defendants propose adopting either Ohio's one or two year statute of limitations. Janzen requires that the statute of limitations for EAHCA cases be determined on a case by case basis by "considering the facts, the circumstances, the posture of the case and the legal theories presented." Id. at 487. Plaintiffs' pro se

complaint is difficult to characterize. In Janzen, the plaintiffs sought reimbursement for the expenses of educating their child. The court treated their claim as an action to recover payment for services rendered but not paid for and applied Tennessee's three year limitations period. Id. at 487-489.

Here, the Rettigs seek reimbursement for past expenses, damages for the failure of the State to provide Thomas with an appropriate education, and injunctive relief requiring that further educational services be provided to Thomas. They allege that the State had a duty to Thomas which was breached either intentionally or negligently. It is unnecessary to characterize each and every one of the Rettigs' claims. Ohio's limitations period for torts involving bodily injury and intential torts is two years. Ohio Rev. Code §2305.10,.11. All other torts are covered by a four-year limitations period. Ohio Rev. Code§305.09. At most, the Rettigs are entitled to a four-year limitations period. No other Ohio limitations period is appropriate. Using a four-year limitations period, all claims involving causes of actions arising prior to December 31, 1983, are barred. It is appropriate to apply the same limitations period to the counts seeking relief under the Declaratory Judgment Act since it too required the use of the analogous state statute. The complaint was filed on December 31, 1987. Accordingly, Counts I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, and XIII, which involve claims arising before December 31, 1983, must be dismissed.

Count V of the Rettigs' complaint is based upon a request for an impartial due process hearing filed on December 12, 1986, challenging Thomas' placement for the years 1970 through 1987. The Rettigs' complaint was taken through several levels of state review. The impartial hearing officer found that no due process hearing was necessary because the issues presented were either res judicata between the parties or were inappropriate for a due process hearing. The Rettigs exhausted their administrative remedies and now seek review pursuant to 20 U.S.C. §1415(e). They allege that Ohio has failed to determine whether Thomas received a free appropriate education for the years 1970-87. This count is directed towards inadequacies in the review procedure, rather than towards the results of that procedure.

The defendants have moved to dismiss this count based on res judicata, statute of limitations, and failure to state a claim. The local defendants argue that the fifteen day limitations for appeals from adverse agency decisions should apply to bar this claim. As discussed earlier, this Court does not find that limitation period sufficient to protect parental rights under the EAHCA or consistent with Sixth Circuit case law. The Court is persuaded that the doctrine of res judicata acts to bar a significant portion of this count. Claims relating to the years 1970-85 either were, or could have been raised in the two previous federal cases.

The only remaining school year is 1986-87. In July 1986, the district court granted the Rettigs an extension of time within which to amend their complaint to raise allegations concerning the 1986-87 school year. They failed to do so, and in October 1986 the Court dismissed their case. Following the dismissal, in December 1986, they requested an administrative due process hearing and proceeded to exhaust their administrative remedies.

Defendants argue that because the Rettigs were given the opportunity to raise issues before the district court concerning the 1986-87 school year, claims regarding that year are now barred. This Court disagrees. In the order of dismissal, the Court noted that the Rettigs had failed to submit an amended complaint raising a claim as to the 1986-87 school year. Thus that year was beyond the court's jurisdiction and there had been no showing that administrative remedies had been exhausted. Rettig, C83-2881 (N.D. Ohio October 26, 1986). Defendants argue that because the Rettigs had the opportunity to raise this claim, the doctrine of res judicata should apply. This Court is unpersuaded. The Rettigs could not have amended their complaint to state a cause of action for the year 1986-87. At the time the amendment was due, they had not yet exhausted their administrative remedies and thus, as the court noted, could not state a claim.

However, Count V fails for other reasons. The Rettigs state only that the "Order failed under federal law to determine whether nor not Thomas has received a public education meeting the requirements of" Ohio and federal law. They have not articulated why the decision of the hearing officer was incorrect. They have not presented an issue

for this Court to review on appeal. This Court cannot guess as to precisely what the Rettigs believe were the errors in that proceeding.

The Court has reviewed the Rettigs' request for an impartial due process hearing. Essentially, it raises the same issues as are presented by this lawsuit. It is twenty-eight pages in length and attempts to raise issues concerning placements and evaluations going back to 1970. No issue is joined which raises claims concerning the deficiency of the IEP for the 1986-87 school year. Instead, it is an attempt to relitigate all that has come before. There can be no error on the part of defendants in refusing to rehear stale claims.

The Court can sympathize with the anguish which Eva Rettig feels concerning her son's condition. However, this Court cannot sit to redetermine rights which have long since been litigated. Nor can this Court guess at what the school system should have done or why the decisions which were made (either as to substance or as to procedure) were inappropriate.

For the reasons stated above, defendants' motions to dismiss are hereby granted. Plaintiffs' complaint is dismissed with prejudice.

IT IS SO ORDERED.

Sig

_____

ANN ALDRICH
UNITED STATES DISTRICT JUDGE

I hereby certify that this instrument is a true and correct copy of the original on file in my office. Attest: James S. Gallas, Clerk U.S. District Court, Northern District of Ohio. By: *Sig* - Deputy Clerk

29 §794. **Nondiscrimination under Federal grants**

No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Pub. L. 93-112, Title V, § 504, Sept. 26, 1973, 87 Stat. 394

Historical Note

Legislative history. For legislative history and purpose of Pub. .L. 93-112, see 1973 U.S.Code Cong. and Adm. News, p. 2076.

••• "However, the following year, in section 111(a) of the Rehabilitation Act Amendments of 1974(Public Law 93-516), Congress amended the definition or "handicapped individual" for purposes of section 504 and the other provisions of titles IV and V of the Rehabilitation Act so that the definition is no longer limited to the dimension of employability. For purposes of section 504 of the Act, a "handicapped individual" is defined as "any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of having such an impairment." With this amended definition, it became clear that section 504 was intended to forbid discrimination against all handicapped individuals. regardless of their need for or ability to benefit from vocational rehabilitation services.

Section 504 thus represents the first Federal civil rights law protecting the rights of handicapped persons and reflects a national commitment to end discrimination on the basis of handicap. The language of section 504 is almost identical to the comparable nondiscrimination provisions of title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 (applying to racial discrimination and to discrimination in education on the basis of sex). It establishes a mandate to end discrimination and to bring handicapped persons into the main stream of American Life. The

Secretary intends vigorously to implement and enforce that mandate.

FEDERAL REGISTER, VOL 42, NO 86-Wednesday, May 4,1997

FEDERAL REGISTER, VOL 42, NO 86-Wednesday, May 4,1997
Title 45--Public Welfare
SUBTITLE A--DEPARTMENT OF HEW, GENERAL ADMINISTRATION PART 84--NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITTING FROM FEDERAL FINANCIAL ASSISTANCE. AGENCY: Department of Health, Education, and Welfare.
ACTION: Final rule.
EFFECTIVE DATE: June 3, 1977.

84.1 Purpose. The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity that receives Federal financial assistance.

84.3 Definitions. As used in this part, the term:

(k) "qualified handicapped person" means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool, elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under paragraph 612 of the Education of the Handicapped Act;

84.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement with respect to

actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial due process hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

84.37 Nonacademic services. (a) General.

(1) A recipient to which this subpart applies shall provide nonacademlc and extracurricular services and activities in such a manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipient, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment....

84.38 Preschool and adult education programs.

A recipient to which this subpart applies that operates a preschool education or day care program or activity may not, on the basis of handicap, exclude qualified handicapped persons from the program or activity and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity."

APPENDIX B
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

ASSURANCE OF COMPLIANCE WITH SECTION 504 OF THE REHABILITATION ACT OF 1973, AS AMENDED

The undersigned (hereinafter called the "recipient") HEREBY AGREES THAT it will comply with section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), all requirements imposed by the applicable HEW regulation (45 C.F.R. Part 84), and all guidelines and interpretations issued pursuant thereto.

Pursuant to § 84.5(a) of the regulation [45 C.F.R. 84.5(a)], the recipient gives this Assurance in consideration of and for the purpose of obtaining any and all federal grants, loans, contracts (except procurement contracts and contracts of insurance or guaranty), property, discounts, or other federal financial assistance extended by the Department of Health, Education, and Welfare after the date of this Assurance, including payments or other assistance made after such date on applications for federal financial assistance that were approved before such date. The recipient recognizes and agrees that such federal financial assistance will be extended in reliance on the representations and agreements made in this Assurance and that the United States will have the right to enforce this Assurance through lawful means. This Assurance is binding on the recipient, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to this Assurance on behalf of the recipient.

This Assurance obligates the recipient for the period during which federal financial assistance is extended to it by the Department of Health, Education, and Welfare or, where the assistance is in the form of real or personal property, for the period provided for in §84.5(b) of the regulation [45 C.F.R. 84.5(b)].

Apendix F-5

The recipient: [Check (a) or (b)]

a. ( ) employs fewer than fifteen persons;
A73

b. (X) employs fifteen or more persons and, pursuant to
A74 § 84.7(a) of the regulation [45 C.F.R. 84.7(a)], has designated the following person(s) to coordinate its efforts to comply With the HEW regulations:

Robert 0. Greer, Assistant Superintendent
Name of Designee(s) -Type or Print
C12 C42

Ohio Department of Education — 65 South Front Street
Name of Recipient -Type or Print — Street Address or P.O.Box
A12 A41 A42 A71

31-6402047 — Columbus
(IRS)Employer Identification Number — City

A1 A11 B12 B41
B1 B11 Ohio 43215
C1 C11 State Zip
B42 B71

I certify that the above information is complete and correct to the best of my knowledge.

June 20, 1977 — *Sig stamp*
Date — Signature and Title of Authorized Official
B72 B77 B78 Franklin B. Walter
Superintendent of Public Instruction

If there has been a change in name or ownership within the List year, please PRINT the former name below:

NOTE: The 'A','B', and 'C' followed by numbers are for computer use. Please disregard.

PLEASE RETURN ORIGINAL TO: Office for Civil Rights, HLW, P. 0. Box S222, Washington, D.C. 20024.

Apendix G-1

Thomas M. RETTIG, et al, Plaintiffs,

v.

KENT CITY SCHOOL DISTRICT, et al, Defendants.

Civ. A. No. C79-2234.

United States District Court,
N. D. Ohio, E. D.

April 24,1981
Opinion After Trial Aug. 25, 1981.

In action for, inter alia, alleged violations of Education of the Handicapped Act and Rehabilitation Act, the District Court, Ann Aldrich, J., held that: (1) there was no valid claim that city school district refused to provide educational opportunity for 1971-1974 as alleged; (2) it was not meant that school system would have to provide any and all services that might be beneficial or that school must experiment with every new teaching technique that might be suggested, and school cannot spend exorbitant amount on one child at expense of others; (3) under evidence, school district tried very hard to accommodate handicapped child's parents and provide good education for their son but found it difficult at times to do both, and evidence failed to establish that school system failed child; (4) under evidence, district's in-service program met requirements of Education of the Handicapped Act for in-service training of teachers, and parents of child were not "support personnel" entitled under the Act to in-service training; (5) district in failing to provide any after-school activities in which autistic child might participate failed to provide after-school activities on equal basis and was in violation of

regulation; and (6) state would be ordered to immediately revise its standard, which allowed State Board of Education 60 days to render its decisions regarding impartial hearings under Education of the Handicapped Act, so as to comply with federal regulation.

Order in accordance with opinion.

1. Federal Civil Procedure ~361

Substitution of parties in their official capacity by adding as defendant person who had replaced named defendant in his official capacity as superintendent of school district was automatic pursuant to rule. Fed.Rules Civ.Proc. Rule 25(d), 28 U.S.C.A.

2. Federal Civil Procedure ~84O

Motion requesting leave to add new cause of action for alleged new statutory violations would be denied out of consideration of fairness to defendants where motion was not filed until some days before date on which case was scheduled for trial.

3. Federal Civil Procedure ~839 Schools ~I48

Both Education of Handicapped Act and Rehabilitation Act required exhaustion of administrative remedies prior to pursuing civil action in district courts, and allowance of amendment of complaint so as to review new educational programs developed for handicapped student in 1979-1980 and 1980-1981 without benefit of any administrative records would not be allowed. Education of the Handicapped Act, §§ 602 et seq., 614(a)(5), 615, 615(e), 20 U.S.C.A. §§ 1401 et seq., l414(a)(5), 1415, 1415(e); Rehabilitation Act of 1973,§§ 2 et seq., 504, 29 U.S.C.A. § 701 et seq., 794.

Opinion After Trial

4. Schools ~148

Where school psychologist made initial determination that child could not substantially profit from any program of instruction available in public schools of city and. although exclusion application was not filed with state for its determination, the parents chose instead to enroll child in private schools, there was no valid claim that city

school district refused to provide educational opportunity for 1971-1974 as alleged. Ohio R.C. § 3321.05 (Repealed); § 5127.01 (now § 5126.06).

5. Schools ~148

Education for All Handicapped Children Act mandates free and appropriate education to all handicapped children of school age. Ohio R.C. § 3321.05 (Repealed).

6. Schools ~148

An "appropriate education" for child as severely handicapped as child in case at bar was one which would give him reasonable chance to acquire skills he needed to function outside of institution, and it was not meant that school system would have to provide any and all services that might be beneficial, or that school must experiment with every new teaching technique that might be suggested, and, although school system has obligation to keep abreast of changing educational strategies and implement them where success may be demonstrated, school cannot spend exorbitant amount on one child at expense of others. Ohio R.C. §3321.05 (Repealed); Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Education of the Handicapped Act, §§ 602(18, 19), 612(5)(B), 20 U.S.C.A. §§ 1401(18, 19), 1412(5)(B).

See publication Words and Phrases
for other judicial constructions and
definitions.

7. Schools ~148

Under evidence in suit for, inter alia. alleged violations of Education of Handicapped Act and Rehabilitation Act, school district tried very hard to accommodate handicapped child's parents and provide good education for their son but found it difficult at times to do both, and evidence failed to establish that school system failed child. Education of the Handicapped Act, § 602 et seq., 20 U.S.C.A. § 1401 et seq.; Fed.Rules Civ.Proc. Rule 52, 28 US.CA.; Rehabilitation Act of 1973, § 504, 29 U.S. C.A. § 794; 42 U.S.C.A. §§ 1981 et seq., 1983; U.S.C.A.Const.Amends. 5, 14.

8. Schools ~148

Major concern of Congress when it adopted in-service training as mandatory component in overall administration of appropriate programs of special education and related services was that most school systems and teachers had little or no experience with handicapped children. Education of the Handicapped Act, § 613(a)(3), 20 U.S.C.A. § 1413(a)(3).

9. Schools ~"148

Under evidence, city school district's in-service program met requirements of Education of the Handicapped Act for in-service training of teachers, and parents of child were not "support personnel" entitled under the Act to in-service training. Education of the Handicapped Act, § 613(a)(3), 20 U.S.C.A. §1413(a)(3).

See publication Words and Phrases for other judicial constructions and definitions.

10. Schools ~148

Where city school district did not provide any after-school activities in which autistic child might participate, but did provide such activities for nonhandicapped students, it failed to provide after-school activities on equal basis and was in violation of regulation. Education of the Handicapped Act,§613(a)(3), 3) U.S.C.A. § 1413(a)(3).

11. Schools ~148

Evidence in suit for, inter alia, alleged violations of Education of the Handicapped Act and Rehabilitation Act failed to establish that it was inappropriate not to furnish educational program for autistic child which would include occupational therapy on continuous basis. Education of the Handicapped Act, §613(a)(3), 3) U.S.C.A. § 1413(a)(3).

12. Schools ~148

School district's assessments of group of children for purpose of compliance with funding legislation, where such assessments did not involve placement decisions for any specific child, and where group

assessments were not utilized in development of any program for him, were not evaluations for which parental consent was required.

13. Schools ~148

School district's application for permission to do evaluation of handicapped child failed to comply with regulations insofar as application gave general description of possible procedures and instruments and did not give general description of procedures and instruments "that will be used."

14. Schools ~148

Evidence in suit for, inter alia, alleged violations of Education of the Handicapped Act and Rehabilitation Act failed to establish failure on the part of state to monitor local school districts for compliance with Education of the Handicapped Act, and, rather, established that state's policy was eminently reasonable. Education of the Handicapped Act, §612(6), 20 U.S.C.A. § 1412(6).

15. Schools ~148

State was ordered to immediately revise its standard, which allowed State Board of Education 60 days to render its decisions regarding impartial hearings under Education of the Handicapped Act, so as to comply with federal regulation. Education of the Handicapped Act, §612(6), 20 U.S.C.A.§ 1412(6).

Edward G. Kramer, Floyd J. Miller, Cleveland, Ohio, Sheridan Neimark, Nat. Soc. for Autistic Children, Washington, D. C., for plaintiffs.

McDowall & Whalen, Dennis M. Whalen, Cuyahoga Falls, Ohio, for Kent City School Dist.

William J. Brown, Atty. Gen., Gary E. Brown and Richard W. Ross, Asst. Attys. Gen., Columbus, Ohio, for Ohio State Bd. of Ed. and Franklin Walter.

Dennis J. Murphy, Alan F. Berliner, Carlile, Patchen, Murphy & Allison, Columbus, Ohio, for Ohio Ass'n for Protection.

Apendix G-6

MEMORANDUM AND ORDER
ANN ALDRICH, District Judge.

Pending in this action is plaintiffs' Motion to File a Second Amended Complaint. For reasons stated below, plaintiffs' motion is granted in part and denied in part. In their Second Amended Complaint, plaintiffs seek 1) to add as defendant Ms. Donna Lightel who has replaced the named defendant Kenneth Cardinal in his official capacity as Superintendent of the Kent City School District; and 2) to add a new cause of action alleging new violations of the Education of the Handicapped Act, 20 U.S.C. §§ 1401 et seq., and the Rehabilitation Act of 1973, 29 U.S.C. § 794.

[1] With respect to the first proposed amendment, the Court finds this substitution of parties in their official capacity to be automatic pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. Therefore, the Complaint will be amended to include Donna Lightel as a defendant, in her capacity as acting Superintendent of the Kent schools.

[2] Plaintiffs' second request is denied. On April 10,1981, some ten days before the date on which this case was scheduled for trial, plaintiffs filed this motion requesting leave to add a new cause of action. Any consideration of fairness to the defendants would lead this Court to deny such a request.

[3] There is, however, an even more important reason why the request must be denied. Both the Education of the Handicapped Act and the Rehabilitation Act require the exhaustion of administrative remedies prior to pursuing a civil action in the district courts. Section 615 of the Education of the Handicapped Act institutes specific procedures at the State and local levels which must be pursued. Subsection (e) of §1415 provides as follows:

Civil action; jurisdiction

(e)(l) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this

subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) *Any party aggrieved by the finding and decision* made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and *any party aggrieved by the findings and decision* under subsection (c) of this section, shall have the right to bring a civil action *with respect to the complaint presented pursuant to this section*, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy ... (Emphasis added)

It is the clear intention of this provision to limit the jurisdiction of the federal district courts to a review of issues already raised in administrative hearings. This restriction on the jurisdiction of the courts reflects a congressional recognition that educational questions, such as those associated with appropriate programs for handicapped children, lie in an area in which the courts lack both specialized knowledge and special experience.

The administrative hearings in this case dealt specifically with the educational program developed for Tommy Rettig during the 1978-1979 school year. As required under Section (a)(5) of the Act, 20 U.S.C.§ 1414(a)(5), this program is revised each year to meet the changing requirements of the child. Plaintiffs now ask this Court to review the new educational programs developed for Tommy Rettig in 1979-1980 and 1980-1981 without the benefit of any administrative record. This Court is not of the opinion that considerations of aileged "judicial economy" can be permitted to circumvent clear congressional intent to limit the Court's jurisdiction. This Court is sympathetic to the plaintiffs' plight; however. the limited scope of this Court s jurisdictional review has been explained, on numerous occasions, to both plaintiff's counsel, and to plaintiffs. The fact that legal remedies are often slow to come does not confer jurisdiction upon this Court over the issues that plaintiffs now seek to add to their Complaint. Plaintiffs' Motion to Amend the Complaint to add a new cause of action is, therefore, denied. IT IS SO ORDERED.

ORDER

It is Ordered and Adjudged that the State defendant immediately revise its standard, 33015-16(D)(5)(b) so as to comply with the federal regulation.

IT IS FURTHER ORDERED that the defendant School District conduct a multi-factored evaluation in strict compliance with 45 C.F.R Section 121a.532. That evaluation will be incorporated in the new IEP to be formulated for the 1981-1982 school year. The Rettigs and an expert of their choice may participate in the development of that IEP.

IT IS FURTHER ORDERED that the Kent City School District provide at least one hour per week of extracurricular activities for Thomas Rettig in accordance with the new IEP.

IT IS FURTHER ORDERED that plaintiffs request that the defendant School District be ordered to continue to provide Thomas Rettig with a free and appropriate education for seven additional years from age 22 to 29 is hereby denied.

IT IS FURTHER ORDERED that each party shall bear their own counsel fees and costs.

IT IS FURTHER ORDERED that the court's opinion and order filed on August 25, 1981 is hereby adopted as findings of fact and conclusions of law, in accordance with Rule 52, Federal Rules of Civil Procedure.

OPINION AFTER TRIAL

This matter is before the Court following trial and presentation of evidence. In accordance with Rule 52 of the Federal Rules of Civil Procedure, the Court herewith submits its Findings of Fact and Conclusions of Law.

PROCEDURAL HISTORY

This action, in part, is a judicial review of several administrative hearings held by the State of Ohio in accordance with provisions of the Education for All Handicapped Children Act of 1975 (EHA), 20 U.S.C. §§1401 et seq.

The administrative process was initiated in February of 1978 when the parents of Thomas Rettig filed a written request for an impartial due process hearing. The administrative hearing began on January 29,

1979, and continued on an interrupted schedule until its conclusion on April 4, 1979. The State-appointed Impartial Hearing Officer issued a decision on April 30, 1979, concluding that the school system was providing a free and appropriate education for Thomas Rettig.

The plaintiffs filed an appeal from this decision to the State Board of Education on May 7, 1979. The State Board of Education, on November 13, 1979, passed a resolution affirming the conclusion of the Impartial Hearing Officer. The present action was filed on November 30, 1979, essentially as an appeal from these administrative decisions pursuant to EHA and the Rehabilitation Act of 1973, 29 U.S.C. § 794.

On December 13, 1979, an amended complaint was filed naming four new defendants, including the State Board of Education, and alleging violations of the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

THE ISSUES

The Court has limited this action to a review of the issues raised by agreement of the parties to the administrative hearing and the additional claims of unconstitutional denials of due process and equal protection, together with claims of State violations of the EHA. Specifically, those issues are:

I. Plaintiffs' allegation that the refusal to permit Thomas Rettig to enroll in the Kent City School District in 1971 violated his rights under the due process and equal protection c[illegible]ses of the United States Constitution.

II. Plaintiffs allegation that defendants failed to provide a free and appropriate education for Thomas Rettig, in violation of the EHA:

A. The failure to provide Thomas Rettig with a twelve-month program of special education and related services;

B. The failure to provide in-service training on effective methods of teaching autistic children;

C. The failure to provide a multi-factored evaluation of Thomas Rettig;

D. The failure to provide nonacademic and extracurricular services and activities in such a manner as to afford Thomas Rettig an equal

opportunity for participation in such services and activities; E. The failure to provide occupational therapy services to Thomas Rettig. III. Plaintiff's allegation that the State Board of Education failed to monitor and assure compliance with the law by the special education programs offered to Thomas Rettig by the Kent City School District. IV. Plaintiffs' allegation that the State standards relating to the issuance of final orders in an administrative appeal violate the EHA on their face and in their application.

FINDINGS OF FACT

Plaintiff Thomas M. Rettig is a sixteen-year-old male child who is severely handicapped. In addition to displaying symptoms of the handicapping condition of autism, he is most. likely mentally retarded. Since his school enrollment he has had periods of progress and periods of regression. Still he functions at a pre-academic level. In 1970, when Tom was five years old, his father sought advice as to the educational prognosis of his son from defendant Michael Chrin, then a child psychologist with the Kent City School District. Mr. Chrin attempted unsuccessfully to administer several standardized psychological tests of Tom. He then recommended to Mr. Rettig that he consider some additional evaluations in the future.

In 1971, when Tom reached compulsory school age, the plaintiff Eva Rettig brought her son Tom to defendant Kent City School District's public school to enroll him. Dr Geraldine Irvin, the school psychologist, again attempted to evaluate Tom to determine proper placement. This evaluation took approximately an hour and fifteen minutes to an hour and a half and included the administration of a standardized intelligence test, parental interview, behavior observations, matching and drawing tests, and visual discrimination instruments. At its conclusion, Dr. Irvin advised Mrs. Rettig that, in her opinion, the Kent City School District did not have any program available for Tom. Dr. Irvin informed Mrs. Rettig that it would be her recommendation that Tom be placed in Happy Day School, a state-supported school for the trainable mentally retarded. Dr. Irvin then consulted with Michael Chrin on her evaluation of Thomas Rettig. He agreed with her recommendation. This opinion was based,

in part, on his own observations of Tom the previous year. Dr. Irvin then completed the required E-1 form to apply to the State Department of Education for its approval to exclude Tom from the Kent City School District in order to permit his enrollment in Happy Day.

Mr. and Mrs. Rettig, who apparently were familiar with the program at Happy Day, refused to consider the possibility of enrolling their son there and chose instead to place him in private nursery schools. When Dr. Irvin and Mr. Chrin became aware that the Rettigs had chosen a private school option, they did not file the E-1 application for exclusion.

In 1972, after a series of tests at Cuyahoga Community College, it was recommended that Tom be enrolled at Our Lady of the Elms School in Akron. Tom remained at Our Lady of the Elms until April 1974, when he entered the Severely and Multiply Impaired (SMI) unit of the Kent City School District.

These SMI classes had just been instituted the previous fall. They were housed at the University School, a private school for grades one through twelve, operated by Kent State University. The Rettigs first approached Michael Chrin in January 1974 about enrolling Tom in the SMI class, but were asked to wait until the spring when an additional aide would be available in the class.

During the summer of 1974, the Rettigs took Tom to the Judevine Center for Autistic Children in St. Louis, Missouri. The Judevine Center is a private institution whose primary purpose is to provide autistic children with the basic attention and motivation skills they need in order for them to function in public school classes. The Center also offers training sessions to both parents and teachers of autistic children.

At the Judevine Center, the Rettigs received three weeks of training in the Judevine method of intervention with autistic children. The Judevine method, as described by Rebecca Blackwell (one of plaintiffs expert witnesses) stresses an intense one-on-one relationship between teacher and child, small classrooms, minimal distractions, and the use of negative reinforcements such as the "time-out box" and food denial.

The Rettigs were impressed with the program at the Judevine Center and the apparent progress Tom had made as a result They

conveyed their enthusiasm over the program to Dr. Robert Stanton, Superintendent of the Kent Schools. Consequently, the Kent City School District arranged for Tom's teacher Ms. Margaret Bell to attend the training program at the Judevine Center. Ms. Bell attended the three-week session in September of 1974. When she returned, she incorporated many of the Judevine techniques in her SMI class for the 1974-75 school year, which Thomas Rettig attended.

During the spring of 1975. Thomas Rettig was hospitalized in Henrotin Hospital in Chicago under the care of Dr. Theron Randolph. During this hospitalization, Dr. Randolph determined that some of Tom's behavioral problems could be attributed to allergic reactions to certain food stuffs, among them, wheat, corn, chocolate, beef, and sugar. He prescribed a strict dietary regimen which required Mrs. Rettig to maintain a rotating menu of foods for Tom so that no item was repeated within a four-day period. Mrs. Rettig spent the summer of 1975 conducting her own allergy tests with Tom to determine his reaction to other foods.

Although the Rettigs had initially been very pleased with Kent's SMI program, during the 1975-76 school year conflicts began to arise between the Rettigs and Ms. Bell over her program of instruction.

The new dietary needs of Tom caused one problem between Ms. Bell and Mrs. Rettig over a class activity that permitted the children to prepare and eat lunch once a week at Ms. Bell's home. Although Tom could participate in setting the table, preparing the food, etc., he often could not eat any of the foods offered. His own meal was prepared at home by Mrs. Rettig, and she delivered it to him at school each day at lunch time. Because denial of food had been used as a negative reinforcement for Tom, Mrs. Rettig worried that Tom would assume he was being punished when he was not permitted to eat the meal he had helped prepare.

Mrs. Rettig also objected to the number of field trips Ms. Bell had planned for the class. In Mrs. Rettig's opinion this was a waste of regular school time. She also insisted that Tom was allergic to bus fumes and therefore could not travel with the class.

These conflicts eventually culminated in a confrontation between Mrs. Rettig and Ms. Bell, and the Rettigs subsequently withdrew Tom from the class in the spring of 1976.

Thomas Rettig was re-enrolled for the 1976-77 school year, but he was transferred to the SMI class of Ms. Linda Leavitt.

Mrs. Rettig soon expressed concern over Ms. Leavitt's teaching methods. Mrs. Rettig complained that Ms. Leavitt also wasted too much time in field trips. In addition, she did not properly employ Judevine techniques; she mis-used the time-out box; on one occasion, for example, an aide apparently went away and left Tom in the box. At another point during the year, Ms. Leavitt experimented with another form of negative reinforcement. Whenever Tom refused to cooperate in his lessons, Ms. Leavitt would walk away and work with another child, explaining to Tom that when he was ready to work he should tell her so. However, Ms. Leavitt was unable to determine whether or not this would have been an effective teaching technique with Tom since it was discontinued after a week and a half at Mrs. Rettig's request.

During the summer of 1977, Thomas Rettig attended a summer school program provided by the Kent State University Department of Special Education. Much of the general program dealt with foods and nutrition so Tom's participation was limited. However, Mrs. Rettig volunteered to work with Tom's teacher for the summer, Ms.Susan Taylor.

Ms. Taylor worked well with Mrs. Rettig and Tom, so well, that Mrs. Rettig submitted a letter of recommendation on behalf of Ms. Taylor to the Kent City School District. Ms. Taylor was hired for the following fall and was Tom's teacher during 1977-78.

During the summer of 1978, Tom was enrolled in a program sponsored by the University. He also attended a camp for handicapped children.

In September 1978, the special education classes housed at the University School were moved to public school buildings. Tom's class was moved to Longcoy School, an elementary school located two blocks from the Rettig's home. Tom s class was moved to Longcoy, as opposed to some other school in the district, because of its proximity to Tom's residence. Mrs. Rettig had complained about the inconvenience of having to bring Tom's lunch to school every day. At Longcoy, Tom could walk to and from school; he could walk home for lunch.

Because the SMI classes were located in a regular public school during the 1978-79 school year, Tom was now afforded some opportunity for structured interaction with non-handicapped students. He attended music, art, and physical education classes with non-handicapped students. He also attended the first half hour of. a normal fourth grade class, accompanied by an aide. He shared lunch and recess periods with non-handicapped students.

During the summer of 1979, Dr. William Bricker of Kent State s Special Education Department offered a program specifically designed for Tom, but the Rettigs refused to enroll him. [1]

CONCLUSIONS OF LAW

I. Allegation of unconstitutional denial of educational opportunity 1971-74:

[4] The plaintiffs claim that Thomas Rettig was denied admission to the school district of his residence, and that the alleged denial of admission violated the plaintiffs constitutional rights to due process and equal protection.

In 1971 when Tom first attempted to enroll in public school, there was no comprehensive statutory scheme mandating the education of handicapped children. What was in existence in 1971 was a statutory scheme whereby local school districts could lawfully exclude children whose handicaps prevented them from participating in regular school programs.

In 1971, Sections 3321.05 and 5127.01 of the Ohio Revised Code were applicable. Section 3321.05 provided in part:

> A child of compulsory school age may be determined to be incapable of profiting by further instruction...
>
> .... the capacity of a child to benefit substantially by further instruction shall be determined with reference to that available to the particular child in the public schools of the district in which he resides ...

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[1]. The summer programs at Kent State provided in 1977, 1978 and 1979 offered three hours of instruction per day for five weeks or more at no cost to the parents.

Section 5127.01 provided in pertinent part:

> The chief of the division of mental retardation and developmental disabilities, with the approval of the director of mental health and retardation, shall establish in any county or district a training center or workshop, residential center, and other programs and services for the special training of mentally retarded persons, including those who have been adjudged by the proper authorities to be eligible for enrollment in public schools under section 3321.01 or 3321.05 of the Revised Code and who are determined by the division of mental retardation and developmental disabilities to be capable of profitting by specialized training...

In *Cuyaboga County Association for Children and Adults v. Essex* 411 F. Supp. 46 (N.D.Ohio 1976), this Court (Judge Green) held that these provisions of the Ohio Revised Code which provided for the exclusion of some mentally handicapped children did not violate any constitutional guarantees. The Court did object, however, to some aspects of the process by which the State of Ohio excluded these children:

> ...Absent a requirement of notice of the grounds upon which dismissal is being sought, a right to review the material to be submitted in support of such application and response thereto or supplement the same and some assurance that all pertinent information will be placed before the decision makers, the required conference is a hollow formality....Due process requires that a child whose educational opportunity is to be affected be afforded equal opportunity with school authorities to make a presentation regarding classification or dismissal. *Ibid* at 58-59.

Plaintiffs complain that none of these procedural safeguards were afforded them.[2] However, the evidence in this case leads to the inescapable conclusion that the Kent City School District never actually excluded Tom. Dr. Irvin, the school psychologist, made an initial determination that Tom could not substantially profit from any

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[2] Thev also contend that Thomas Rettig did not fall within the definition of a child"...incapable of profiting by further instruction..."

program of instruction available in the Kent public schools. She discussed her conclusion with Mrs. Rettig. Dr. Irvin went so far as to fill out the exclusion application which, under ORC 1 3321.05, must be filed with the State for its determination, but this application, known as the "E-1 form", was never filed. The Rettigs chose instead to enroll Tom in private schools. This Court cannot speculate as to what procedures might have been followed had the exclusion process actually been pursued by the School District, nor can it speculate as to what standards for exclusion might have been applied. Since the plaintiffs elected to obtain educational placement in a private school, there cannot now be a valid claim that the Kent City School District refused to provide an educational opportunity from 1971-1974 as alleged in the Amended Complaint.

II. *Allegation of failure to provide an appropriate" education:*

Plaintiffs have charged defendants with violations of the EHA and Section 504 of the Rehabilitation Act of 1973. Although these form separate bases of jurisdiction, the discussion in this opinion will focus upon the provisions of the EHA. As the regulations promulgated under Section 504 indicate, a school system will provide the free and appropriate education and procedural safeguards required under Section 504 by complying with the EHA. 34 C.F.R. §§1104.33(b)(2) and 104.36.

[5] The Education for All Handicapped Children Act mandates a "free and appropriate education" to all handicapped children of school age.[3] Unfortunately, Congress did not supply much in the way of substantive content to the concept of an "appropriate" education. Instead, Congress emphasized the uniqueness of each handicapped child's educational requirements and defined appropriate education as "special education and related services ... provided in conformity with the individualized education program". 20 U.S.C. § 1401(18). The individualized education program (IEP) is developed by the parents

[3] EHA was passed by Congress in 1975 and its statutory provisions became effective as of the [1092] 1976-77 school year. Regulations under the Act were not promulgated until 1977.

and educators working together and states with some degree of precision the child's present level of performance, the objectives of his program and the services that will achieve them, and objective criteria for determining success. *Id.* §1401(19). To ensure that the IEP accurately reflects the needs of the child, the Act requires a multifactored evaluation so that no single procedure, such as a standardized IQ test, is relied on exclusively in determining the child's abilities.

For purposes of determining placement, the Act sets out a second criterion in addition to appropriateness: "[T]o the maximum extent appropriate, handicapped children ... are [to be] educated with children who are not handicapped." 20) U.S.C. § 1412(5)(B).Thus it is clear that a major emphasis of the EHA is to "mainstream" handicapped children.

In discussing the goals of the EHA, the Senate Report states: "With proper education services, many (handicapped children] would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society". S.Rep.No.94-168, 94th Cong., 1st Sess., reprinted in 1975 U.S.Code Cong.& Ad.News 1425, 1433.

[6] Therefore, this Court concludes that an "appropriate" education for a child as severely handicapped as Thomas Rettig is one that gives him a reasonable chance to acquire the skills he needs to function outside of an institution. This does not mean that the child deserves a perfect education. Indeed, it is unlikely that any child, handicapped or otherwise, ever receives a perfect education. It does not mean that a school system has to provide any and all services that might be beneficial. It does not mean that the school must experiment with every new teaching technique that may be suggested.

Despite the contention of the plaintiffs that money is no object under EHA, the courts, in general, have not adopted that approach. See *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3d Cir. 1980); *Rowley v. Board of Education*, 483 F. Supp. 526 (S. D.N.Y.1980), aff d, 632 F.2d 945 (2d Cir. 1980); *Pinkerton v. Moye*, 509 F.Supp. 107 (W.D.Vir.1981); and, by analogy, *Pennburst v.*

Halderman, 451 Us. 1, 101 S.Ct. 1531, 67 LEd.2d 694 (1981). It hardly needs to be stated that educational funding is not unlimited, and a school cannot spend an exorbitant amount on one child at the expense of all its other handicapped children. But the school system does have an obligation to keep abreast of changing educational strategies and implement them where success may be demonstrated.

[7] None of these fine goals lend much guidance to this Court in reviewing the educational requirements of Thomas Rettig. Because of his complicated handicapping conditions of autism and retardation, and because no multi-factored evaluation of Tom exists, it is almost impossible to accurately determine what his potential is, even if that were a proper role for this Court. The plaintiffs' own experts have presented conflicting opinions as to what they believe an appropriate education for Tom entails.

Rebecca Blackwell of the Judevine Center and Dr. William Bricker of Kent State University both counsel a classroom model. The classroom model revolves around the view that the autistic child has very little motivation to learn and is easily distracted. It stresses small classrooms, one-on-one teaching, and use of negative reinforcements.

Dr. Louis Brown, Dr. Ann Donnellan and Ms. Alison Ford of the University of Wisconsin represent the view that the autistic child does not generalize, i.e., that what he learns in the classroom he does not know how to apply in the practical environment. This functionalist model stresses moving out of the classroom.

The Kent City School District began with the classroom model. The District even sent Tom's teacher Ms. Bell to the Judevine Center for training. To the extent that Tom's teachers have attempted to take him out of the classroom, they have been frustrated by the Rettigs' insistence first, that field trips are a waste of time and second, that Tom cannot ride a bus, swim in a pool, or have a meal away from school because of his allergies.

In fact, it appears to the Court that many of the efforts of Tom's teachers and the School District have been frustrated by the constant intrusions of Mrs. Rettig. The Court appreciates the concern these parents have for their son. It borders on heartbreak to see parents so necessarily involved in the education of a child. But if the Kent City School District is confused as to just exactly what the Rettigs

expect in the way of an education for Tom, then the Court can appreciate its position also.

For example, the Rettigs expert witness Dr. Louis Brown testified that Tom's education ought to be provided with age-appropriate peers, i.e, other sixteen-year-olds. The Rettigs now ask this Court to order the School District to move Tom's class to the high school. Yet Tom's class was originally placed at Longcoy School at the parents' request so that he could walk to school. He could not walk to the high school. Dr. Brown recommends that Tom be taught skills in the environment in which it is most appropriate for them to be performed, like parks, restaurants and other public buildings. Yet Tom's parents have consistently in the past objected to any trips outside the school.

Dr. Brown, Dr. Ann Donnellon, and Alison Ford all stressed that Tom receive instruction in functional skills such as crossing the street, using public transportation, using elevators. Yet Tom's teacher spent a considerable amount of time teaching Tom to write his name cursively at the parents' request.

The record does not support plaintiffs' picture of an obstinate and uncaring school system, but rather one that has tried very hard to accommodate the Rettigs and provide a good education for their son, but finds it difficult at times to do both.

Many of the plaintiffs' experts base their opinion that the education provided to Tom by the Kent City School District was inappropriate on the fact that Tom has made little progress. Yet it is also clear from their testimony that children such as Tom are extremely hard to reach. No one can guarantee results with these children. Dr. Donnellon testified that autistic children, like Tom, are rote ritualistic--yet their mental retardation makes it necessary to repeat a thing in order for them to retain it. Thus, teachers are often caught in the bind of contributing to the very problem they seek to correct.

This Court is unable to declare that the school system has failed Tom. The progress reports and the testimony of Tom's parents and teachers indicate that he has gained some social skills and some self-help skills, but he fails at academic tasks. In terms of Tom's own needs, it is apparent to this Court that academics ought to be

secondary because if Tom is going to escape institutionalization, he needs to master some very basic self-help skills.

A. Summer School:

Most of the experts, including defendant KSCD's expert Christopher Matey, Low-Incidence Coordinator for the Greenhills-Forest Park Board of Education, agree that some type of summer program would be beneficial to Thomas Rettig. However, the issue is not whether it might be beneficial but whether a summer school program is a necessary component of an appropriate education for Tom. In the opinion of this Court, it would be appropriate if it would prevent significant regression of skills or knowledge retained by Tom so as to seriously affect his progress toward self-sufficiency.

The record indicates that Thomas Rettig was offered and did attend summer school during the summer of 1978. For that summer session, Tom's teacher Sue Taylor reviewed his 1977-78 IEP with his summer school teacher so that her instruction would be consistent with his regular school program. Nevertheless Ms. Taylor testified that despite the 1978 summer experience, Tom exhibited signs of regression at the beginning of the 1978-79 school year. Mrs. Rettig herself testified that Tom's periods of regression do not necessarily occur during the summer but are a year-round phenomenon. None of the experts who testified had any actual knowledge of Tom's regressive tendencies.

On the basis of this record, the Court is unwilling to order a summer school program for Thomas Rettig. However, if on the basis of a multi-factored evaluation, a new IEP for Tom called for summer school, the Court would expect the Kent City School District to offer that program and would expect the State of Ohio to provide funding[4]

B. In-Service Training

[8] In-service training is a mandatory component in the overall administration of appropriate programs of special education and related services. 20 US.C. § 1413(a)(3) provides that:

... (A) the development and implementation of a

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[4] See this Court's Memorandum and Order dated September 15, 1980, on the class action issue.

> comprehensive system of personnel development which shall include the inservice training of general and special educational, instructional and support personnel, detailed procedures to assure that all personnel necessary to carry out the purposes of this chapter are appropriately and adequately prepared and trained and effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects.....

The legislative history regarding the issue of in-service training demonstrates that Congress major concern when it adopted this requirement was that most school systems and teachers had little or no experience with handicapped children:

> ...if the integration of handicapped children into the classroom is to be accomplished, several important changes must take place ... A teacher, who will be responsible for the management of the handicapped children in [the] classroom ...The Committee is aware that there is a shortage of fully qualified personnel trained to serve all handicapped in educational programs. Therefore, the Committee has determined that a program's continuous in-service training be undertaken to provide general and support personnel with basic requirements needed to serve handicapped children in the classroom.

1975 U.S.Code Cong. & Ad.News, 1457.

[9] However, the Kent City School District had had its SMI programs in operation for two years already. According to the testimony of Dr. Donnellon, this was years before public schools anywhere else in the country were offering programs for autistic children.

There is testimony in the administrative record, as well as supplemental evidence elicited at trial, concerning workshops, conferences, and other activities which employees of the school

system attended, all with the encouragement and the funding of the school system. Internal staff meetings at which the teachers can discuss problems and exchange ideas are almost a daily occurrence among the members of the special education department of the Kent schools. When the SMI classes were moved from University School to public school buildings, meetings were conducted by Dr. Chrin with the entire staff in those buildings to explain the special needs of the handicapped students. Mr. Chrin works closely with his teaching staff and is always available to make suggestions or help work out a new teaching strategy. Although Mr. Chrin is not an expert in autism, as director of the program at Kent since its inception in 1974, he has had considerable experience in working with these children. He does observe his teachers often and does provide them with feedback on their performance.

Plaintiffs contend that none of these in-service activities included immediate implementation under supervised conditions, nor were any of the teachers ever tested on their new knowledge. However, it does not appear to this Court that it is necessary to treat these teachers like recalcitrant children. All of the teachers who testified appeared to be responsible dedicated professionals. They showed tremendous concern over the education of Thomas Rettig. They do need some supervision and they do need access to new information and new techniques. This Court is satisfied that the Kent City School District's in-service program meets these requirements.

Secondly, plaintiffs ask the Court to include "parents" within the meaning of "support personnel" and order the School District to provide in-service training for Mr. and Mrs. Rettig. On its face, the statute is not clear as to what persons were included in "support personnel". However, the legislative history suggests that the term refers to other professional staff employed by a school system:

> ....The supportive service should be provided by trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel.

1975 U.S.Code Cong. & Adm.News 1457. This Court does not find that it includes parents.

C Extracurricular Activities and Related Services:

[10] Although the Act itself does not specifically address extracurricular activities and related services, regulations promulgated under its auspices do. 45 C.F.R.§ 121a.306 provides as follows:

> (a) Each public agency shall take steps to provide non academic and extracurricular services and activities in such a manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

Extracurricular activities are offered to non-handicapped students to provide them with experiences outside the realm of their normal classroom activities. It appears to the Court that plaintiffs' latest set of experts (Dr. Brown, Dr. Donnellon, and Alison Ford), in emphasizing moving Tom out of the classroom, have essentially defined his whole education in terms of extracurricular activities. It then becomes difficult to justify additional time spent with Tom repeating the same kinds of experiences he gets during his normal school day. It would not be the same kind of enrichment that non-handicapped students derive from extracurricular activities. Of course, Tommy would benefit from the extra hour or two per week just as he might benefit from the constant instruction available at a residential school.

However, the education that Tom received between 1976 and 1979 was primarily a classroom experience. In conjunction with the classroom experience, the Kent City School District did not provide any after school activities in which a child like Thomas Rettig might participate, although the School District did provide such activities for its non-handicapped students. It therefore failed to provide after school activities on an equal basis, and has been in violation of 45 C.F.R. § 121a.306.

D. Occupational Therapy:

This issue of occupational therapy for Thomas Rettig first

arose in discussions over the 1976-77 IEP. Specifically, this involves a technique known as sensory integrative therapy, developed by a Dr. A. G. Ayers in California. At that time, the Kent City School District did not employ an occupational therapist; however, Mr. Chrin did obtain consultation services. During the 1977-78 school year, Ms. Cathy Pierce, an occupational therapist with the Mid-Eastern Ohio Special Education Regional Resource Center (MEO-SERRC), provided occupational therapy services on a weekly basis. Tom was not provided these services because the Rettigs refused to grant permission to have Tom evaluated. However, Philippa Campbell, an occupational therapist at Children's Hospital in Akron, Ohio who had evaluated Tom at the Rettigs' request, did instruct Ms. Taylor, Tom's teacher, in therapy techniques to use with Tom. According to Ms. Campbell's testimony, occupational therapy can be administered effectively by a lay person with adequate instruction.

In December of 1978, the Kent City School District hired Lorraine Lowe, an experienced qualified occupational therapist Ms. Lowe evaluated Thomas Rettig, recommended that he receive sensory integrative therapy and testified at the administrative hearing that as soon as she completed her evaluations of the special education children, she would begin therapy sessions with Tom.

[11] Plaintiffs argue that this issue is not yet moot, however, since it goes to the issue of appropriate relief, specifically compensatory education and also to the issue of summer school. Plaintiffs contend that occupational therapy, like medical treatment, should be administered continuously until the child is cured. This does not permit a three-month hiatus in services over the summer. Plaintiffs expert Philippa Campbell testified that "the standard model for occupational therapy as well as other therapies is that therapy is provided until such point as a child no longer requires it and that it is provided continuously." P. Campbell, Tr. 154 [February 21, 19791 Ms. Lowe testified that in her private practice in New York, she and her partner, an Ayers faculty member, did not treat children during the summer. Neither witness testified as to how long Thomas Rettig might require therapy. Based on this evidence, the Court finds that an educational program for Thomas Rettig which does not include

occupational therapy on a continuous basis is not necessarily "inappropriate".

E. A Multi-factored Evaluation:

[12] Plaintiffs' allegation with respect to this issue has three components: first, that the Kent City School District has failed to provide a publicly-financed medical evaluation of Tom; second, that the Kent City School District has conducted evaluations without obtaining parental permission; and third, that the information made available to parents when permission is sought is inadequate.

The administrative record is clear that the Kent City School District did not provide, either before or after Thomas Rettig's initial placement, a publicly paid for, in-depth medical evaluation. Plaintiffs contend that had such a medical evaluation been completed in 1974 prior to Tom's placement in SMI class, as required, his allergic reaction to certain foodstuffs would have been discovered a year earlier. They further contend that since Tom's allergies interfere with his ability to learn, the practical effect of the defendants' failure was to deny Tom the benefit of a year of schooling. However, the applicable standard in 1974 merely stated that "[a]ll children being considered shall be examined by a licensed physician for initial placement ..." Comprehensive Plan for the Education of the Handicapped, adopted July 1, 1973, p. 23.

Since the Rettigs had to take their son to Chicago in order to obtain the allergy treatment outlined by Dr. Theron Randolph, it may be assumed that this treatment was not available locally. In fact, upon examination of Dr. Randolph's methods it taxes the credulity of this Court to believe that a standard medical examination by a local physician would have uncovered Tom's condition.

> State regulations provide:
> 1. The parents shall be notified of intent to identify and evaluate their child suspected of needing a special education program or related service and shall be provided an opportunity to submit any data relevant to the subsequent evaluation of their child.

2. Written parental permission shall be obtained before evaluation is initiated.

3301-51-18 (B). *Standards for Special Education.*

The administrative record indicates at least two instances in which standardized testing of all the children in the SMI classes, including Tom, were undertaken by the Kent school system without notifying or requesting permission of the Rettigs, one in June of 1977, the other in May or June of 1978. It was the testimony of Mr. Chrin that these particular procedures were not administered for the purpose of determining an appropriate educational placement for any particular child but rather that these group assessments were a necessary component of the District's application for federal monies to help fund the program. The State standards define an "evaluation" for which parental consent is required as:

> .....those activities involved in gathering data about a specific child, including such methods of testing and interviewing, for the purposes of determining an appropriate educational placement for the child
>
> .....[Emphasis added.]

3301-51-16 (A)(4)(m), *Standards for Special Education.*

These assessments of a group of children for the purpose of compliance with funding legislation did not involve placement decisions for any specific child, including Tom. Additionally, Ms. Taylor, Tom s teacher 1977-79, testified that she did not utilize the group assessments in the development of any-IEP for him. For these reasons, the Court finds no legal necessity to obtain permission of the Rettigs prior to conducting these assessments.

[13] When parental permission is sought by the Kent City School District, it must comply with the State regulations contained in 3301-15-18(B)(5). 3301-15-18(B)(5) lists ten items of information that must be provided to the parents prior to any evaluation of their child. The Rettigs have consistently refused to permit any evaluation of their son since 1976, alleging that the School District has failed to

supply the requisite information.[5] In reviewing the application for permission to do an evaluation submitted to the Rettigs on September 13, 1978, the Court finds the application, for the most part, to be in compliance. It fails, however, as required by 3301-15-18(B)(5)(f) to give a "[g]eneral description of procedures and instruments that will be used," [Emphasis added.) Instead it provides a list of possible procedures and instruments, and to that extent, it is inadequate.

On the basis of the record in this case, there is considerable question as to whether the Rettigs would have permitted any evaluation of their son that included standardized tests. It is clear from her testimony at the administrative hearing that Mrs. Rettig firmly believes that no norm-referenced instrument is descriptive at all of her son's ability.

To some extent, it is true that autistic children are not testable. One of the primary characteristics of their handicap is that they do not seem to care to interact with other human beings. This lack of social behavior extends to parents, teachers, peers, etc., and to anyone attempting to administer a standardized test. They do not cooperate with the tester and thus, they may score much lower than their actual mental potential.

It is Mrs. Rettig's nightmare that the Kent City School District will use the results of standardized tests as the basis upon which to "force the parents to agree to place Tommy into a 169 program for retarded children", (such as Happy Day School.) See letter dated 11-22-79 from Mrs. Rettig to the Members of the State Board of Education. However, it is clear to the Court from the expert testimony in this case that despite the problems associated with standardized tests, they can be used to gain certain information and insight into the capabilities of an autistic child and, in addition, provide an objective

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[5]. In 1976 prior to the adoption of the above-referenced regulations, Dr. Robert Robinson of MEO-SERCC did administer a psychological evaluation of Thomas Rettig for the Kent City School District. According to Dr. Robinson's report, this consisted of five different assessment instruments and observational data. During the administration of these tests, Tom's teacher was present in order to properly motivate Tom and properly interpret his responses. Inasmuch as "no single procedure was the sole criterion" for Dr. Robinson s final recommendation, this evaluation was "multi-factored".

criterion for comparison in the future. The fact that norm-referenced procedures are used, in and of itself, does not render a multi-factored evaluation valueless.

III. Allegation of failure to monitor compliance:

[14] Plaintiffs produced only one witness on this issue, Dr. Samuel Bonham, Director of the Division of Special Education for the Ohio Department of Education. He testified that not only was Ohio the first state in the country to develop a comprehensive scheme for monitoring special education programs, but that Ohio's monitoring program is considered a model by other systems throughout the country. Based on that record, this Court cannot make a finding that the State has failed to monitor local school districts for compliance with EHA.

Plaintiffs contend that the very fact that the State Board of Education approved the decision of the Impartial Hearing Officer in this case demonstrates a failure to monitor. The Court finds this argument unpersuasive. Further, plaintiffs contend that the policy of the Ohio Department of Education to take no action against a school system once an impartial hearing has been requested is violative of the federal provision requiring states to monitor. See 20 U.S.C. § 1412(6).

Adoption of this view would require the State to impose sanctions before there has been a final determination as to whether a school system has, in fact, failed to comply with some aspect of the EHA. In light of the fact that the State's only sanction is to withdraw funds from the school district involved, and the obvious penalty that this would inflict on all of the district's handicapped children, the Court finds the State's policy to be eminently reasonable.

IV. *Allegation of violation of EHA by state standards regarding issuance of decisions on appeal:*

> [15] The federal regulations pertaining to the procedural safeguards available under the EHA provide as follows:
> (a) The public agency shall insure that no later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

45 C.F.R. §° 121a.512

Neither of these provisions has been followed in this case. Subsection (a) was apparently abrogated by the parties themselves, who agreed to an interrupted trial schedule that eventually lingered on for four months, January to April, 1979. Subsection (b) was completely ignored by the State which failed to render a decision even within the 60 days permitted under State standards.[6] The Court can certainly appreciate the State's claim that this was an extremely complicated case, but 193 days far exceed the realm of reasonable delay.

Because of these delays, by the time this case reached the level of federal court review, the record was already very cold. A new IEP for Thomas Rettig was already being formulated. That IEP is not properly before this Court, since EHA requires exhaustion of administrative remedies.[7] Hence, this Court has found itself in the very uncomfortable position of reviewing an educational program that is no longer applicable. Such a review can hardly be deemed meaningful, at least not from Tommy Rettig's point of view.

The State defendant is ordered to immediately revise its standard, 3301-5-16(D)(5)(b) [which allows the State Board of Education 60 days to render its decisions reviewing impartial hearings] so as to comply with the federal regulation.

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[6]. Even if the Court takes into consideration the fact that Mrs. Rettig did not submit her brief until July 20. 1979, the State did not render its decision within 30, or even 60, days from that date.

[7]. See this Court's Order dated April 24. 1981.

Apendix G-30

RELIEF

1. The defendant School District has previously petitioned this Court for permission to administer a multi-factored evaluation of Thomas Rettig. In the interests of defusing the conflict between the School District and the Rettigs, and ensuring that Thomas Rettig's education continues to be appropriate for his needs, the Court orders the School District to conduct a multi-factored evaluation in strict compliance with 45 C.F.R. Section 121a.532. That evaluation will be incorporated in the new IEP to be formulated for the 1981-82 school year. The Rettigs and an expert of their choice may participate in the development of that IEP.

2. The Kent City School District is further ordered to provide at least one hour per week of extracurricular activities for Thomas Rettig in accordance with the new IEP.

3. The State defendant, as indicated in a prior section of this opinion, is ordered to revise the time allowance in 3301-5--16(D)(5)(b) and to adopt a 30-day standard.

4. As for plaintiffs request that the defendant School District be ordered to continue to provide Thomas Rettig with a free and appropriate education for seven additional years from age 22 to 29, this Court would order compensatory education in an appropriate case. See, for example, *Campbell v. Grissett*, C.A. No. 79-M-277, (N.D. Ala. March 31, 1981); however, the fact pattern here is easily distinguishable.

5. In light of the fact that each of the parties has prevailed on some of the merits, this Court is not inclined to award counsel fees. Each party is to bear its own costs.

IT IS SO ORDERED.

Apendix G-31

TEXT OF OPINIONS
RETTIG v. KENT CITY SCHOOL DIST.
Cite as 720 F.2d 463 (1983)

Thomas M. RETTIG, et at., Plaintiffs-Appellants, Cross Appellees,

v.

KENT CITY SCHOOL DISTRICT, De. fendant -Appellee, Cross-Appellant,

and

Kenneth Cardinal, et at,

Defendants- Appellees.
Nos. 81-4586, 81-3595.

United States Court of Appeals,
Sixth Circuit

Argued June 80, 1983.
Decided Nov. 8, 1983.
Rehearing Denied Jan. 3,1984.

Handicapped student and his mother petitioned for review of decision of the Ohio State Board of Education which affirmed hearing officer's decision in favor of school district on complaint of the student's parents questioning quality of education their son was receiving. The United States District Court for the Northern District of Ohio, Ann Aldrich, J., 539 F.Supp. 768, affirmed hearing officer's decision but directed school district to provide student with one hour of extracurricular activities each week, and the parties cross-appealed. The Court of Appeals, Krupansky, Circuit Judge, held that: (1) school district provided adequate in-service training under terms of the Education for All Handicapped Children Act; (2) specific programs requested by plaintiffs were not necessary to permit student to benefit from his instruction; and (8) the Act did not require the state of Ohio to maximize potential of the student commensurate with opportunity

Affirmed in part and vacated and remanded in part.

1. Schools ~148

The Education for All Handicapped Act did not oblige school district to provide in-service training to parents of handicapped student, and in-service training provided by the school district to its employed staff was adequate. Education of the Handicapped Act, § 601 et seq., as amended, 20 U.S.C.A. §1401 et seq.

2. Schools ~148

District court properly refused to interfere with state of Ohio's implementation of its educational program as it related to handicapped student; specific programs requested by student's parents were not necessary to permit student to benefit from his instruction. Education of the Handicapped Act, 1601 et seq., as amended, 20 U.S.C.A.§ 1401 et seq.

3. Schools ~148

The Education for All Handicapped Children Act did not require that the state of Ohio maximize potential of handicapped child commensurate with opportunity provided to other children. Education of the Handicapped Act, § 601 et seq., as amended, 20 U.S.C.A. § 1401 et seq.

Edward G. Kramer, Floyd J. Miller, Cleveland, Ohio, for plaintiffs-appellants, cross-appellees.

Eva Rettig, pro se.

Dennis M. Whalen (argued), G. Frederick Compton, Jr., Dennis M. Whalen Co., L.P.A., Cuyahoga Falls, Ohio, Gary E. Brown (argued), Asst Atty. Gen., Columbus, Ohio, for defendant-appellee, cross-appellant.

Edward G. Kramer, Floyd J. Miller, Kramer and Associates Co., L.P.A., Cleveland, Ohio, amicus curiae on behalf of appellants.

Before LIVELY, Chief Judge, KRUPANSKY, Circuit Judge, and FEIKENS, District Judge*.

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*The Hon. John Feikens, United States District Judge for the Eastern District of Michigan, sitting by designation.

This is an appeal and cross-appeal from the final order of the District Court for the Northern District of Ohio in this action involving the education of a handicapped child.

The district court entered extensive findings of fact below and reference is made to that opinion for a full exposition of the background of this controversy. See, *Rettig v. Kent City School District*, 539 F.Supp. 768 (N.D.Ohio 1981). It is sufficient to restate here that Thomas M. Rettig (Thomas) is a severely handicapped teen-age child. Thomas displays symptoms of autism and is also believed to be mentally retarded.

In February of 1978 Thomas' parents requested a due process hearing pursuant to the Education for All Handicapped Children Act of 1975 (EHCA or Act) 20 U.S.C. § 1401 *et seq.*, questioning the quality of the education their son was receiving. A hearing was conducted before a Hearing Officer in accordance with § 1415(b)(2) of the Act. The Hearing Officer decided in favor of the Kent City School District and issued a comprehensive opinion on April 30, 1979. It was affirmed by the State Board of Education.

The initial complaint in this matter was filed in the District Court for the Northern District of Ohio on November 80, 1979. The complaint joined Thomas and his mother as parties plaintiff and named the Kent City School District as defendant. Plaintiffs, in the initial complaint, essentially petitioned for review of the state decision pursuant to 20 U.S.C.§ 1415(e)(2), [1] and also asserted violations of the Rehabilitation Act of 1973,29 U.S.C. § 794. An amended complaint incorporated additional allegations of constitutional infringements under 42 U.S.C. 1 1983 and joined, as defendants, the superintendent

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[1]. 20 U.S.C.§ 1415(e)(2) provides that any party aggrieved by the resolution of an administrative hearing under the Act: shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

of the Kent City School District, the director of special education for the district, the State Board of Education of Ohio and the state superintendent of education.

The lower court, subsequent to duly conducted hearings in August of 1980, denied plaintiffs' request for a preliminary injunction. The trial court issued its final order in May of 1981, subsequent to a trial of the case on its merits.

The trial court upheld the administrative Hearing Officer's decision, concluding that: (a) the defendants had provided adequate inservice training for faculty and staff; (b) the defendants had devised and implemented a reasonable educational program for Thomas which would not be modified; (c) a twelve month educational program for Thomas was not required under the Act; and (d) continuous occupational therapy for Thomas was not a requirement of the Act.

The lower court did, however, direct the Kent City School District to provide Thomas with one hour of extracurricular activities each week and further decreed that the State Board of Education amend its rules to conform with federal regulations.[2] The lower court concluded, as a matter of fact, that plaintiffs had failed to prove their constitutional infringements. It also characterized the plaintiffs claims arising under the Rehabilitation Act as merely restatements of EHCA charges and disposed of those charges by incorporating them into its resolution of the latter. Finally, the lower court declined to award attorney fees.

The plaintiffs appealed the trial court's decision insisting that Thomas was being denied a free appropriate education. The Kent City School District cross-appealed from the lower court's order mandating the district to provide Thomas with one hour of extracurricular activities each week. The State revised its regulations in accordance with the lower court's order and did not appeal. See O.A.C. § 3301-51-02(6)(12)(f).

Initially, we conclude that the lower court's findings with respect to the constitutional claims are not clearly erroneous and we

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[2]. Federal regulations mandate a final disposition of all appeals from decisions of Hearing Officers within 30 days of issuance thereof. 34 C.F.R. I 300.512 (1982). The State rules permitted a 60-day interval.

affirm the court's ruling as to those claims. This Court also agrees that, in this case, the plaintiffs' complaints purportedly arising under the Rehabilitation Act, with one exception, are resolved by the disposition of the EHCA claims. See 84 C.F.R.§ 104.83,104.36 (1982). Accordingly, this Court is confronted with only those issues joined under the EHCA. In considering the asserted violations of the EHCA the Court is directed to the Supreme Court's recent explication of the Act.

In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690(1982), the Supreme Court reviewed the policies, procedures and objectives of the Act. It also specifically identified and delimited a court's obligation in actions instituted pursuant to § 1415(e)(2). The Court stated:

> [A] court's inquiry in suits brought under § 1415(e)(2) is two-fold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Id. at 206, 102 S.Ct. at 3051 (footnotes omitted).

Plaintiffs urge that both inquiries should be answered in the negative. In addressing the procedural requirements of the Act the plaintiffs assert that the State failed to develop adequate programs for inservice training of teachers and support personnel as directed by the EHCA.

The EHCA specifically requires a State participating under the Act to submit a plan incorporating, *inter alia:*

> a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the inservice training of general and special educational instructional and support personnel, ...
>
> [11] The district court found that the defendants had

developed and implemented a wide range of inservice training programs which satisfied the requirements of the EHCA. That conclusion is supported by the record.

Plaintiffs have argued, however, that parents should be included within the meaning of "support personnel" and therefore the Kent City School District was obliged to provide inservice training to the parents of Thomas. The legislative history, however, discloses that Congress intended the term "support personnel" to denote professional staff employed by the school system. The Senate Report, in discussing the Act's provision regarding inservice training, stated, in pertinent part:

> High quality educational services for all handicapped children will require a greater number of support personnel, as well as teachers. The supportive services should be provided by trained occupational therapists, speech therapists, psychologists, social workers and other appropriately trained personnel.

S.Rep. No. 94-168, 94th Cong., 1st Sess. 34, *reprinted in* [1975] U.S.Code Cong. & Ad. News, 1425, 1457. Accordingly, plaintiffs' contention that "support personnel" should include parents is unfounded and this Court concludes that defendants provided adequate inservice training under the terms of the EHCA.

[2] The plaintiffs have challenged the quality of the educational program developed for Thomas in several respects. In sum, however, the plaintiffs' arguments merely reflect a difference of opinion as to the most effective teaching methods available to advance Thomas' education. Various experts testified as to an appropriate educational program for Thomas. The courts, however, are not free to choose between competing educational theories and impose that selection upon the school system. As the Supreme Court admonished in *Rowley, supra* at 206,102 S.Ct. at 3051-52:

> In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state

> and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of "acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials." § 1413(a)(3). In the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to §1415(e)(2).
>
> We previously have cautioned that court's lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." *San Antonio School District v. Rodriguez*, 411 US. 1,42[93 S.Ct. 1278, 1301, 86 L.Ed.2d 16] (1973). We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

(footnotes omitted). This Court is of the opinion, therefore, that the lower court was correct in refusing to interfere with the State's implementation of its educational program as it related to Thomas. To the extent the plaintiffs requested the trial court to order the school district to include specific programs within Thomas' curriculum-- for example, summer classes and continuous occupational therapy-- this Court affirms the district court's denial of such relief inasmuch as the programs were not necessary to permit Thomas to benefit from his

instruction.[3]

[3] The trial court ruled in favor of the plaintiffs in addressing the issue of Thomas' extracurricular activities. In granting this relief, the trial court relied on the following administrative regulation promulgated under the Act:

> §300.306 Non-academic services.
> (a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

34 C.F.R. § 300.306 (1982).[4] The regulation apparently adopts a standard designed to ensure that handicapped children are exposed to extracurricular activities on an equal basis with non-handicapped children.

In *Rowley*, however, the Supreme Court specifically rejected a construction of the EHCA which required "that States maximize the potential of handicapped children 'commensurate with the opportunity

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[3]. The lower court also ordered the School District to conduct a multi-factored evaluation of Thomas. The School District, in fact, had attempted to perform such an evaluation but his parents objected, charging that the basis of norm-referenced or standardized testing was inappropriate for autistic children. The evidence disclosed however that such testing was an important component of an overall evaluation. It was, therefore, reasonable to require the parents of Thomas, as a condition to receiving benefits under the Act, to permit the school district to perform an evaluation of Thomas. See, *Vander Malle v. Ambach*, 673 F.2d 49(2nd Cir.1982).

[4]. The regulation was initially promulgated by the Secretary of Health, Education and Welfare and appeared at 45 C.F.R. § 1210.306. However, the functions of the Secretary of Health, Education and Welfare with respect to the Act were transferred to the Secretary of Education. Pub.L. No. 96-88 § 601, 93 Stat. 696. The regulation in issue, along with scores of others, was thereafter transferred to Title 34 and redesignated. 45 Fed.Reg. 77368 (1980).

provided to other children.' " *Rowley supra* at 189, 102 S. Ct. At 3042, *quoting*, 483 F. Supp. 528 at 534.

The regulation and the lower court's opinion antedated the Supreme Court's opinion in Rowley. This Court therefore deems it appropriate to remand this issue to the district court for further consideration in light of the pronouncements in Rowley.[5]

In accordance with this opinion, the judgment below is AFFIRMED in all respects except that portion requiring the school district to provide extracurricular activities to Thomas which is VACATED and REMANDED for further consideration.[6] Each party shall pay its own costs.

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[5] This last issue is the exception previously alluded to wherein application of the Rehabilitation Act could provide a resolution different from that achieved by application of the EHCA. See 34 C.F.R.I 104.37(1982). The lower court is free to address this issue on remand.

[6] Amlcus curiae has briefed the Issue of attorney fees. In light of the remand, the attorney fee issue is not ripe for final resolution.

Apendix G-40

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON. D. C. 20543

May 21, 1984

Mr. Thomas M. Rettig
586 Francis Street
Kent, OH 44240

Re: Thomas M. Rettig
v. Kent City School District~ et at.
No. 83-6494

Dear Mr. Rettig:

The Court today entered the following order in the above entitled case:

The appeal is dismissed for want of jurisdiction. Treating the pacers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

Very truly yours,

Alexander L. Stevas, Clerk

sig stamp

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON. D. C. 20543

June 18, 1984

Mr. Thomas M. Rettig
586 Francis Street
Kent, OH 44240

Re: Thomas M. Rettig,
v. Kent City School District, et at.
No. 83-6494

Dear Mr. Rettig;

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Very truly yours,

Alexander L. Stevas, Clerk

sig stamp

Filed 1984 JAN 26 PM 2:31
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS M. RETTIG, et al.	)	Civil Action
Plaintiffs	)	No. C79-2234
	)	
vs.	)	
	)	
KENT CITY SCHOOL	)	
DISTRICT, et al.	)	MEMORANDUM AND
Defendants	)	ORDER

ALDRICH, J.

This matter came before the Court for judicial review of administrative hearings held by the State of Ohio concerning the education of Thomas M. Rettig, a handicapped child, as authorized by provisions of the Education for All Handicapped Children Act of 1975 ("Act"), 20 U.S.C. §1401 et seq. After a trial to the bench, the Court issued an Opinion and Order on August 25, 1981, in which it ordered the Kent City School District ("District") to make certain changes in its Individualized Education Program ("IEP") for Rettig for the 1981-1982 academic year. The complicated and unhappy history of this dispute is set forth in that opinion. Rettig v. Kent City School District, 539 F. Supp. 768 (N.D. Ohio 1981).

Both parties appealed to the United States Court of Appeals for the Sixth Circuit. Affirming this Court on all other issues, the three judge panel remanded for further consideration only the question of whether the Court's order that the District provide Rettig with at least one hour of extracurricular activities per week remained appropriate in light of Board of Education of the Hendrick Hudson Central School District v. Rowley. 102 S. Ct. 3034 (1982). See Rettig v. Kent City School District. _____ F.2d _____ (6th Cir. Nov. 8, 1983).

Upon consideration, the Court finds that the relief granted in its original opinion comports with the standards set forth in Rowley. In addition, the Court finds that any alteration of the relief provided in the Opinion would be improper, since the Court's decision concerned a subject matter - the 1981-82 IEP - which is now moot.

I. ROWLEY ANALYSIS

The Court's order that the District provide Rettig with extracurricular activities rested on a regulation promulgated by the Department of Health and Human Services pursuant to the Act. Title 34 U.S.C. 5300.306 [1] provides:

[1] At the time of the Court's opinion, the same regulation was codified at 45 C.F. R. 5121a.306.

> (a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary for participation in those services and activities.
>
> The Court found that:
>
> ...the education that Tom received between 1976 and 1979 was primarily a classroom experience. In conjunction with the classroom experience, the Kent City School District did not provide any after school activities in which a child like Thomas Rettig might participate, although the School District did provide such activities for its non-handicapped students. It therefore failed to provide after school activities on an equal basis, and has been in violation of [the regulation].

539 F. Supp. at 780.

Neither the regulation nor this Court's interpretation of it violate the letter or spirit of Rowley. Reversing a district court order requiring that a school district provide a sign language interpreter for a deaf student, Amy Rowley, the Supreme Court rejected her

> ...conten[tion] that "the goal of the Act is to provide each handicapped child with an equal educational opportunity." . . . [T]he requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child' s potential. "commensurate with the opportunity provided other children." ...Congress sought "to provide assistance to the States in carrying out their responsibilities under . . . the Constitution of the United States to provide equal protection of the Laws." . . . But we do not think that such statements imply a congressional intent to achieve strict equality of opportunity or services.
> .....The requirement that States provide "equal" educational opportunities would thus seem to present an entirely

> unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.

103 S. Ct. at 3046-47 (citations omitted.)

The Court concluded:

> ....[T]he District Court found that the "evidence firmly establishes that Amy is receiving an 'adequate' education ...." In light of this finding, and of the fact that Amy was receiving personalized instruction and related services calculated by the . . . school administrators to meet her educational needs, the lower courts should not have concluded that the Act requires the provision of a sign-language interpreter.

Id. At 3052.

This Court's order concerning Rettig's extra-curricular activities does not violate Rowley. We did not read the requirement of 34 C.F.R. §300.306 (a) that the District "afford handicapped children an equal opportunity for participation" to mandate the "strict equality of opportunity or services" eschewed by Rowley. Rather, this Court sought to rectify a situation in which the District had failed to "provide any after school activities in which a child like Thomas Rettig might participate ...." Ordering the District to provide Rettig

with at least one hour per week of extracurricular activities did not seek to force it to provide services "sufficient to maximize [Rettig's] potential "commensurate with the opportunity provided other children." 102 S.Ct. at 3046. The order simply sought to provide him with the "free appropriate public education" that is indisputably the subject matter of the Act. Id at 3047.

This Court therefore determines that its order concerning Rettig's extracurricular activities was appropriate under the Act, the regulation, and Rowley.

II. MOOTNESS

Under Article III of the Constitution, this Court sits to decide "Cases" and "Controversies" and may not issue advisory opinions on abstract questions. The doctrine of "mootness", which prevents courts from hearing actions that no longer present a justiciable issue, has two aspects: "when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack. 395 U.S. 486, 496 (1969); see generally United States Parole Commission v.. Geraghty. 445 U.S. 388, 396 (1980); Defunis v. Odegaard, 416 U.S. 312 (1974).

This matter came before the Court for judicial review of administrative hearings concerning Rettig's IEP for the 1981-82 academic year. The controversy over that plan cannot be considered a "live" one. Indeed, to amend at this time the IEP for a school year long since concluded would be, as it were, the very essence of mootness.[2] The Clerk is instructed to close the file to No. C79-2234. IT IS SO ORDERED.

Sig

ANN ALDIRCH
UNITED STATES DISTRICT JUDGE

[2] Rettig recently commenced a new action against the District challenging the education it has provided him in the school years since 1981-82. See Rettig v. Kent City School District, No. C83- 2881. (N.D. Ohio filed July 15, 1983) (Lambros, J.).

Apendix G-46

788 FEDERAL REPORTER, 2d SERIES

Thomas M. RETTIG; Eva 0. Rettig. Plaintiffs-Appellees, Cross-Appellants,

v.

KENT CITY SCHOOL DISTRICT, et al., Defendants-Appellants, Cross-Appellees.
Nos. 84-3167, 84-3187.

United States Court of Appeals, Sixth Circuit.

Argued Oct. 25, 1985.

Decided March 10, 1986.

Handicapped student and his mother petitioned for review of decision of the Ohio State Board of Education which affirmed hearing officer's decision in favor of school district on complaint of student's parents questioning quality of education their son was receiving. The United States District Court for the Northern District of Ohio, Ann Aldrich, J., 539 F.Supp. 768. affirmed, but directed school district to provide student with one hour of extracurricular activities each week, and the parties cross-appealed. After remand by the Court of Appeals, 720 F.2d 463, the District Court determined that matter had become moot as it concerned student, but reaffirmed its earlier decision ordering one hour of extracurricular activities per week, and parties cross-appealed. The Court of Appeals, Krupansky, Circuit Judge, held that under the Education for All Handicapped Children Act, school district was not obligated to provide extracurricular activities to student, where student, because of lack of interest and sporadic and recurring behavior, would receive no significant educational benefit

from extracurricular activities.

Reversed.

See also, 94 F.R.D. 12.

1. Federal Courts ~ 12

To satisfy case or controversy requirement, actual controversy must exist at all stages of review, and not simply on date action is initiated. U.S.C.A. Const. Art. 3, § 1 et seq.

2. Federal Courts ~ 12

Capable of repetition exception to mootness applies in exceptional situations where named plaintiff can support reasonable showing that he will be again subjected to complained of conduct.

3. Federal Courts ~ 724

Issue of whether providing handicapped student with one hour of extracurricular activities each week satisfied requirements of the Education for All Handicapped Children Act was capable of repetition, yet evading review, and thus, appeal from order reaffirming prior decision granting relief under the Act was not moot, even though relief was granted for a time long since concluded. Education of the Handicapped Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.

4. Schools ~ 148(2)

The Education for All Handicapped Children Act does not absolutely require that handicapped child be provided each and every special service available to non-handicapped children; rather, applicable test is whether handicapped child's individualized educational plan, when taken in its entirety, is reasonably calculated to enable child to receive educational benefits. Education of the Handicapped Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.

5. Schools ~148(2)

Regulation requiring that handicapped children be given equal opportunity for participation in extracurricular activities conflicts with the Education for All Handicapped Children Act, which only requires that child's individualized educational plan, in its entirety, be reasonably calculated to enable child to receive educational benefits. Education of the Handicapped Act, § 601 et seq., as amended, 20 U.S.C.A. § 1400 et seq.

6. Schools ~148(2)

Under the Education for All Handicapped Children Act, school district was not obligated to provide extracurricular activities to handicapped student, where student, because of lack of interest and sporadic and recurring behavior, would receive no significant educational benefit from extracurricular activities. Education of the Handicapped Act, § 602(17), as amended, 20 U.S.C.A. § 1401(17).

Dennis M. Whalen. G. Frederick Come ton, Jr. (argued), Dennis M. Whalen Co., L.P.A., Cuyahoga Falls, Ohio, B. Douglas Anderson (argued) Asst. Atty. Gen., Columbus, Ohio~for defendants-appellants, cross-appellees

Thomas M. Rettig and Eva 0. Rettig, pro se.

Before KRUPANSKY and MILBURN, Circuit Judges, and JOINER, District Judge.*

KRUPANSKY, Circuit Judge.

Appellant-Cross Appellee Kent City School District and Appellees-Cross- Appellants Thomas and Eva Rettig appeal from the district court's final order in this action which was initiated pursuant to the Education for All Handicapped Children Act of 1975. (EHCA or Act) 20 U.S.C. § 1400 et seq.

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* Hon. Charles W. Joiner. District Judge. United States District Court for the Eastern District of Michigan, sitting by designation

Thomas Rettig (Thomas) is a twenty year old handicapped child who manifests symptoms of autism. Thomas has, for a number of years, and is currently receiving special education services in the Kent City School District. He will continue to receive this special education until he is twenty-two years of age.

In February of 1978, Thomas parents (Rettigs) requested a due process hearing pursuant to the EHCA, questioning the validity of the special education their son was receiving in the Kent City School District. In a comprehensive opinion dated April 30, 1979, a state-appointed impartial hearing officer concluded that the Kent City School District was providing Thomas with a "free appropriate public education" as required by the Act. The State Board of Education affirmed the hearing officer's opinion.

Thereafter, Thomas and his mother, Eva 0. Rettig, commenced this action seeking review of the state decision pursuant to 20 U.S.C. § 1415(e)(2), asserting violations of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and alleging constitutional infringements pursuant to 42 U.S.C. § 1983. After a trial on the merits, the district court, 539 F.Supp. 768, upheld the administrative hearing officer's decision and concluded that the plaintiffs had failed to prove their asserted constitutional infringements. The lower court did, however, direct the Kent City School District to incorporate one hour of extracurricular activities each week in Thomas' 1981-82 Individualized Educational Plan (IEP).

The Rettigs appealed the trial court's decision, insisting that Thomas was being denied an appropriate free education. The Kent City School District cross-appealed from the lower court's order mandating the district to afford Thomas one hour of extra- curricular activities per week. This court, 720 F.2d 463, vacated that part of the district court s judgment concerning the extra- curricular activities to be made available to Thomas each week and remanded that single issue to the trial court for further consideration in light of the Supreme Court's decision in *Board of Education of Hendrick Hudson Central School District v. Row ley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). In all other respects, this court affirmed the district court's judgment.

On January 26, 1984, the district court decided that the matter had become moot as it concerned Thomas because the earlier order granted relief for a time period, the 1981-82 school year, which had "long since concluded", but nonetheless, reaffirmed its earlier decision ordering one hour of extracurricular activities per week. This appeal and cross-appeal followed.

[1] Of initial concern to this court is the threshold issue of subject matter jurisdiction. Article III grants the federal courts jurisdiction over cases and controversies. To satisfy the case or controversy requirement, an actual controversy must exist at all stages of review, and not simply on the date the action is initiated. *Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 712, 35 L.Ed.2d 147 *reh'g denied* 410 U.s. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 (1973).

The issue of mootness must, however, be considered by applying the doctrine of "capable of repetition, yet evading review" as enunciated in *Southern Pacific Terminal* Co. v . ICC , 219 U.s. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911).

[2] The capable-of-repetition rule applies in exceptional situations where the named plaintiff can support a reasonable showing that he will be again subjected to the complained of conduct. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) citing *DcFunis v. Odegaard*, 416 U.S. 312, 319, 94 S.Ct. 1704, 1707, 40 L.Ed.2d 164 (1974).

In *Board of Education of the Hendrick Hudson School District t . Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), the Supreme Court reviewed, under the provisions of the EHCA, a handicapped child's IEP for a schoolyear that had previously expired. Noting that the protracted period required to exhaust judicial review in most instances exceeds nine months, the Court stated that a federal court retained jurisdiction to grant relief pursuant to the EHCA where the alleged deficiencies in the IEP were "capable of repetition *as to the parties before it* yet evading review." *Rowley*, 458 U.S. at 186 n. 9,102 S.Ct. at 3040-41 n. 9 (emphasis added).

[3] As a handicapped child, Thomas is entitled to a public education under Ohio law until he attains the age of twenty-two. See,

e.g., Ohio Rev.Code § 3328.01(A) and 3323.07. At oral argument, counsel for the Kent City School District indicated that the school district would comply with the mandate of the Ohio statute. Accordingly, the issue of providing Thomas with one hour of extracurricular activities each week for the period of the School District's statutory mandate remains a viable issue that is capable of repetition, yet evading review. Because this case falls within a clearly defined exception to the mootness doctrine, this court invokes its jurisdiction to consider the substantive issue presented herein.

In disposing of the merits joined by this Court's mandate of August 25, 1981, the district court reaffirmed its previous order requiring that Thomas be afforded one hour of extra-curricular activities per week and concluded that its earlier disposition of the issue was correct and came within the pronouncements of the Supreme Court's decision in *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.s. 176, 203, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982).

The district court reasoned that 34 C.F.R. § 300.306, the regulation which addresses the subject of extra-curricular activities, was valid under *Rowley*. That regulation provides:

> (a) Each public agency shall take steps to provide nonacademic and extra-curricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.
>
> (b) Nonacademic and extra-curricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the public agency and assistance in making outside employment available.

The school district, however, argues that the regulation is invalid pursuant to the teachings of *Rowley* insofar as it mandates "equal opportunity" for participation in extra-curricular activities.

In *Rowley*, the parents of a deaf child brought suit under the EHCA insisting that their daughter should have been provided with a qualified sign language interpreter in all of her academic classes. Although the trial court found that the child was performing better than the average child in her class, it nonetheless concluded that the child had not been receiving a "free appropriate public education" because she had not been performing as well academically as she would have if she were not deaf. The Supreme Court reversed the judgment of the district court, concluding that the EHCA did not mandate state public education systems to ensure that each handicapped child be provided with special education services which maximize the handicapped child's potential commensurate with the opportunity provided to other children.

The *Rowley* Court indicated that by enacting the EHCA, "Congress sought primarily to identify and evaluate handicapped children and to provide them with access to a free public education." 458 U.S. at 200, 102 S.Ct. at 3048. The Court reasoned that a state could meet its obligation to provide a handicapped child with a free appropriate public education "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203, 102 S.Ct. at 3049. The Court further said that a handicapped child's IEP met the Act's substantive standards when it was "reasonably calculated to enable the child to receive educational benefits." *Id.* at 207, 102 S.Ct. at 3051.

[4] After declaring that Congress had not intended to achieve "strict equality of opportunity or services" through the EHCA, the Court opined:

> The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available

> to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.

Id at 198-99, 102 S.Ct. at 3047. Accordingly, the Act does not absolutely require that a handicapped child be provided each and every special service available to non- handicapped children. Rather, the applicable test under *Rowley* is whether the handicapped child s IEP, when taken in its entirety, is reasonably calculated to enable the child to receive educational benefits.

[5] 34 C.F.R. § 300.306, relied upon by the district court to mandate "an equal opportunity for participation in ... [extracurricular) activities", requires strict equality of opportunity, and accordingly is in conflict with the pronouncements of *Rowley.*

[6] Plaintiffs argue that the extra-curricular requirement imposed by the district court can be independently supported because the requirement was necessary to permit Thomas to benefit from his educational program. The Rettigs contend that Thomas' "free appropriate public education" should include activities required to assist him to "benefit from special education." 20 U.S.C. § 1401(17). However, the state appointed hearing officer determined that because of Thomas' "sporadic and recurring behavior, including, regurgitation, lack of interest, self-stimulating activities and bladder accidents," he was unable to significantly benefit from extra-curricular programs. Accordingly, the school district was not obligated to provide extracurricular activities from which Thomas would receive no significant educational benefit.

In their cross-appeal, the plaintiffs advance several issues that

were fully litigated in the 1981 district court proceedings and have been previously resolved on appeal to this court and the United States Supreme Court. Accordingly, the Rettigs' cross-appeal is hereby dismissed.[1] For the reasons stated herein, the judgment of the district court is REVERSED.

---

[1] On March 12, 1985, the Kent City School District filed a motion to strike the joint appendix filed by the Rettigs and for leave to file a supplemental appendix. In an order dated May 2, 1985, this court denied the motion to strike, granted the school district leave to file a supplemental appendix, and referred to this panel defendant's motion to assess the costs of preparing the supplemental appendix to the Rettigs. Because the relevant documents contained in the supplemental appendix were also incorporated in the joint appendix, defendant's motion is hereby overruled.

Apendix G-55

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON. D. C. 20543

June 30, 1986

Ms. Eva 0. Rettig
586 Francis Street
Kent, OH 44240

Re: Thomas M. Rettig'and Eva 0. Rettig,
v. Kent School District, et at.
No. 85-1843

Dear Ms. Rettig:

The Court today entered the the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

Sig Stamp

FILED
1986 Oct 23 PM 4:24
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS M. RETTIG, et al., Plaintiffs	)	
	)	No. C 83-2881
v.	)	
KENT CITY SCHOOL DISTRICT, et al., Defendants	)	JUDGMENT

LAMBROS, DISTRICT JUDGE

In accordance with the memorandum opinion and order of this date in the above- captioned case, this action is dismissed, as plaintiffs have failed to exhaust state remedies as required under the Education for All Handicapped Children Act, 20 U.S.C. §§14O1-l461, and pursuant to compelling precedent.

Judgment is entered in favor of defendants, as plaintiffs fail to state a claim upon which relief may be granted. Rule l2(b)(6), Fed. R. Civ. P.

This action is dismissed and terminated.

IT IS SO ORDERED.

Sig

_____

Thomas D. Lambros
United States District Judge

DATED: October 23, 1986

FILED
1986 Oct 23 PM 4:24
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS M. RETTIG, et al., Plaintiffs	)	
	)	No. C 83-2881
v.	)	
KENT CITY SCHOOL DISTRICT, et al., Defendants	)	MEMORANDUM OPINION AND ORDER

LAMBROS, DISTRICT JUDGE

This action arises under the provisions of 20 U.S.C. §1415(e)(2), the Education for All Handicapped Children Act, as a review of a final state level decision on a disputed Individualized Educational Program (IEP) developed for plaintiff Thomas Rettig in 1983. On August 10, 1985, the undersigned Judge deferred ruling on defendants' motion to dismiss plaintiff's first amended complaint, in light of the pendency of an appeal involving these parties in a case which was decided by Judge Ann Aldrich. In Rettig v. Kent City School District, Nos. 84-3167 & 84-3187 (6th Cir. March 10, 1986), cert. denied, No.8501843 (United States June 30, 1986), the Sixth Circuit reversed the district court judgment, and held that the Kent City School District was not obligated to provide extracurricular activities for Thomas Rettig.

Following the Sixth Circuit's March 10, 1986 ruling, plaintiffs moved for leave to file a second amended complaint to be considered by the undersigned prior to ruling on defendant's motion

to dismiss. On June 20, 1986, plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.

In an Order of July 15,1986, the undersigned Judge granted plaintiffs twenty days to submit a proposed second amended complaint, and ordered plaintiffs to focus exclusively on the IEP developed for Thomas for the 1986-87 school year. Plaintiffs were ordered to "state with specificity what administrative procedures, it *(sic)* any, plaintiffs have pursued relative to the 1986-87 IEP." Additionally in that Order, plaintiffs motions for temporary restraining order and preliminary injunction were denied, in light of the Sixth Circuit's decision in Rettig v. Kent City School District, 720 F.2d 463,466 (6th Cir. 1983). The thrust of plaintiff's June 20, 1986 motion for injunctive relief was that Thomas Rettig was entitled to placement in a summer school program. In an earlier, clearly applicable Sixth Circuit decision in this matter, the Court affirmed Judge Aldrich's decision that the Kent City School District was not legally required to place Thomas in a summer school program. Accordingly, in the present case, the undersigned Judge applied the Sixth Circuit ruling and denied plaintiff's motions. for a temporary restraining order and a preliminary injunction.

On July 24, 1986, plaintiffs moved that the undersigned Judge reconsider the June 20, 1986 denial of the motion for temporary restraining order, "based upon the decisions of higher courts." The undersigned Judge has reviewed the two Sixth Circuit rulings in this matter, and accordingly, the earlier denial of the temporary restraining order will not be disturbed.

In their motion of July 24, 1986, plaintiffs also allege that the Sixth Circuit "provided no review meeting proper adjudication under the Fourteenth Amendment's equal protection clause, involving Ohio school law, and the actions and inactions of defendants vis-a-vis Tom". As the district court does not exercise any review jurisdiction over higher court decisions, the undersigned Judge is without jurisdiction to pass on plaintiff's claim.

In the July 15, 1986 Order, the undersigned Judge allowed plaintiffs twenty days to submit a proposed amended complaint, to focus exclusively on the IEP developed for Thomas Rettig during the 1986-87 school year, and to state with specificity, what administrative

procedures, if any, plaintiffs have pursued relative to the 1986-87 IEP. Plaintiffs have failed to comply with the Order of July 15, 1986. Plaintiffs have not set forth an amended complaint focusing exclusively on the IEP developed for the 1986-87 school year. The instant action commenced as a review of a final state level decision on a disputed IEP developed in 1983. Accordingly, the 1986-87 IEP is beyond the jurisdiction of this Court in the present case. Further, plaintiffs have not set forth any administrative remedy which has been either pursued or exhausted with respect to the proposed 1986-87 IEP.

The requirement of exhaustion of administrative remedies prior to seeking federal court relief was set forth by the United States Supreme Court in Smith v. Robinson, 104 S. Ct. 3457 (1984):

> [t]he [EAHCA] is a comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children. Both the provisions of the statute and its legislative history indicate that Congress intended handicapped children with Constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute.
>
> * * *
>
> In light of the comprehensive nature of the procedures and guarantees set out in the [EAHCA] and Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child, we find it difficult to believe that Congress also meant to leave undisturbed the ability of a handicapped child to go directly to Court with an equal protection claim to a free appropriate public education. Not only would such a result render superfluous most of the detailed procedural protections outlined in the statute, but, more important, it would run counter to Congress' view that

> the needs of handicapped ~~children~~ are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education. No federal district court presented with a constitutional claim to a public education can duplicate that process.

104 5. Ct.

The Court, then, held as follows:

> In this case we think Congress' intent is clear. Allowing a plaintiff to circumvent the [EAHCA] administrative remedies would be inconsistent with Congress carefully tailored scheme. The legislative history gives no indication that Congress intended such a result. Rather, it indicates that Congress perceived the [EAHCA] as the most effective vehicle for protecting the constitutional right of a handicapped child to a public education. We conclude, therefore, that where the [EAHCA] is available to a handicapped child asserting a right to a free, appropriate public education, based either on the [EAHCA] or on the Equal Protection Clause of the Fourteenth Amendment, the [EAHCA] is the exclusive avenue through which the child and his parents or guardian can pursue their claim.

104 S. Ct. at 3470

Although the undersigned Judge has great sympathy and concern for the circumstances of the Rettigs, the United States Supreme Court has made it clear that plaintiffs must exhaust their state administrative remedies with respect to the 1986-87 IEP. Once an administrative record is established, then the Court will have jurisdiction to consider whether plaintiff has stated a claim under the equal protection clause or under the EAHCA, 20 U.S.C. §1401-1461. Accordingly, even considering plaintiffs' proposed second amended complaint, the undersigned Judge is compelled to find, under binding

precedent from both the United States Supreme Court, and the Sixth Circuit Court of Appeals, that plaintiffs fail to state a claim upon which relief may be granted. Thereby, this action is dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P.

IT IS SO ORDERED.

sig

Thomas D. Lambros
United States District Judge

DATED: October 23, 1986

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON. D. C. 20543

March 18, 1991

Mr. Thomas Rettig
586 Francis Street
Kent, OH 44240

Re: Eva 0. Rettig
v. Kent City School District, et al.
No. 90-1088
Thomas M. Rettig
v. Kent City School District, et al.
No. 90-6388

Dear Mr. Rettig:

The Court today entered the following order in each of the above entitled cases:

The petition for a writ of certiorari is denied.

Very truly yours.

sig stamp
William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON. D. C. 20543

May 13, 1991

Mr. Thomas Rettig
586 Francis Street
Kent, OH 44240

Re: Thomas M. Rettig
v. Kent City School District, et al.
No. 90-6388

Dear Mr. Rettig:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Very truly yours,

sig stamp
William K. Suter, Clerk

Apendix G-63

No. 91-3611

FILED
AUG 07 1991
LEONARD GREEN,Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: THOMAS M. RETTIG)
Petitioner)
) ORDER
)

BEFORE: KENNEDY and JONES, Circuit Judges; and HARVEY, Senior District
Judge*.

The petitioner seeks a writ of mandamus directing the district court "to exercise its jurisdiction which it has wrongfully declined to exercise" and "to proceed to trial/judgment on the merits" of his civil action. In response, the district court has submitted a copy of its docket sheet.

The petitioner and his mother filed this action (their third) in 1987 challenging the petitioner's education under the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 et seq. The district court dismissed the action, primarily on grounds of res judicata. On direct appeal, this court affirmed that dismissal, Rettig, et al. v. Kent City School District, et al., No. 89-3881 (6th Cir. August 29, 1990) (per curiam), and the United States Supreme Court denied certiorari. 111 S.Ct. 1311, 2047 (1991).

*The Honorable James Harvey, Senior U.S. District Judge for the Eastern District of Michigan, sitting by designation.

The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought. Will v. Calvert Fire Insurance Co., 437 U.S. 655, 661-62 (1978); Kerr v. United States District Court, 426 U.S. 394, 402-03 (1976). It cannot be used as a substitute for an appeal. City of Cleveland v. Krupansky, 619 F.2d 572, 575 (6th Cir.) (per curiam), cert. denied, 449 U.S. 834 (1980). Here, the petitioner seeks to use the present mandamus petition as a second appeal of the district court's order dismissing his action. Having already received full appellate review before this court, he may not use the present petition in such a manner.

It therefore is ORDERED that the petition for a writ of mandamus is denied.

ENTERED BY ORDER OF THE COURT

sig

Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON. D. C. 20543

January 13, 1992

Mr. Thomas Rettig
586 Francis Street
Kent, OH 44240

Apendix G-65

Re: In Re Thomas Rettig
No. 91-6384

Dear Mr. Rettig:

The Court today entered the following order in the above entitled case:
The petition for a writ of mandamus is denied.

Very truly yours.

Sig

William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

March 6, 1992

Thomas M. Rettig
586 Francis Street
Kent, Ohio 44240

RE: In re Thomas M. Rettig
No. 91-6384

Dear Mr. Rettig:

The application "for all appropriate relief from the 28 July 1989 District Court memorandum and order" was received March 3, 1992 and is herewith returned. Such relief is not available in the form of an application pursuant to Rule 22.

Very truly yours,

William K. Suter, Clerk
By

sig

Christopher W. Vasil
Deputy Clerk

Enclosures

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON. D. C. 20543

March 9, 1992

Mr. Thomas Rettig
586 Francis Street
Kent, OH 44240

Re: In Re Thomas Rettig
No. 91-6384

Dear Mr. Rettig:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Very truly yours,

sig stamp

William K. Suter, Clerk

No. 92-3792

FILED
NOV 19 1992
LEONARD GREEN, CLERK

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: THOMAS M. RETTIG	)	
	)	ORDER
Petitioner	)	

BEFORE: KENNEDY, MARTIN, and SUHRHEINRICH, Circuit Judges.

The petitioner has submitted a voluminous petition for a writ of mandamus in which he asks this court to order the Kent City School District and other state education officials to "restore" his benefits to a free and appropriate public education under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §

1401 et seq. The district court which handled the prior litigation in this matter urges that the petition be denied. The petitioner has filed a reply to that response.

The petitioner's efforts to gain certain benefits under federal statutes pertaining to the education of handicapped children began in 1979 when he filed a complaint in the district court. Since that time, his claims have produced much litigation, including three appeals to this court. See Rettig V. Kent City School District, 720 F.2d 463 (6th Cir. 1983), cert. denied, 467 U.S. 1201 (1984); Rettig v. Kent City School District, 788 F.2d 328 (6th Cir.), cert. denied, 478 U.S. 1005 (1986); Rettig v. Kent City School District, 912 F.2d 466 (6th Cir. 1990) (Unpublished per curiam), cert. denied, - U.S.-, 111 S. Ct. 1311 (1991). In the latter decision, this court affirmed a district court order dismissing the petitioner's most recent complaint on grounds of res judicata. The court also noted the cause of action appeared to be moot because the petitioner was beyond the age group to which federal benefits adhered.

In 1991, the petitioner filed a mandamus petition in this court seeking an order directing the district court "to exercise its jurisdiction which it has wrongfully declined to exercise" and "to proceed to trial/judgment on the merits" of his litigation. This court denied relief, stating:

> Here, the petitioner seeks to use the present mandamus petition as a second appeal of the district court's order dismissing his action. Having already received full appellate review before this court, he may not use the present petition in such a manner.

In re: Thomas M. Rettig, No. 91-3611 (6th Cir. August 7, 1991) (unpublished order), cert. denied, -- U.S. --, 112 S. Ct. 918 (1992).

The present petition is yet another attempt by the petitioner to avoid the finality of the litigation which resulted in the dismissal of his latest claims. For the reasons stated in the above quotation, we again decline his invitation to revisit his claims or reopen prior litigation. It therefore is ORDERED that the petition for a writ of mandamus is denied.

Apendix G-69

ENTERED BY ORDER OF THE COURT

sig

_____

Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON. D. C. 20543

March 29, 1993

Mr. Thomas Pt. Rettig
586 Francis Street
Kent, OH 44240

Re: In Re Thomas M. Rettig
No. 92-7761

Dear Mr. Rettig:

The Court today entered the following order in the above entitled case:
The petition for a writ of mandamus is denied.

Very Truly yours,

sig stamp

William K. Suter, Clerk

Apendix G-70

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON. D. C. 20543

May 17, 1993

Mr. Thomas Pt. Rettig
586 Francis Street
Kent, OH 44240

RE: In Re Thomas M. Rettig
No. 92-7761

Dear Mr. Rettig:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Very truly yours,

Sig stamp

William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

September 14, 1993

Thomas M. Rettig
586 Francis Street
Kent, OH 44240

RE: Thomas M. Rettig and Eva 0. Rettig v. Ohio, et al.

Dear Mr. Rettig:

Your motion for leave to file a bill of complaint and complaint were received August 31, 1993, and must be returned since this Court does not have original jurisdiction under Article II of the Constitution to entertain a suit between a citizen and a state. See 28 U.S.C. 1251. Also returned is your check, number 4114, in the amount of $300. The original jurisdiction of this Court extends to suits between two or more states, or a state and the United States.

Very truly yours,

William K. Suter, Clerk

sig

By_____
Francis J. Lorson
Chief Deputy Clerk

Enclosures

cc: Christopher Culley
Dennis Whalen

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

March 20, 2000

Mr. Thomas Rettig
586 Francis Street
Kent, OH 44240

Re: Thomas M. Rettig
v. Kent City School District, et al.
No. 99-7720

Dear Mr. Rettig:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

sig stamp
William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

May 1, 2000

Mr. Thomas Rettig
586 Francis Street
Kent, OH 44240

Re: Thomas M. Rettig
v. Kent City School District, et al.
No. 99-7720

Dear Mr. Rettig:

The Court today entered the following order in the above entitled case:

The petition for rehearing is denied.

Sincerely,

sig stamp

William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

October 2, 2000

Mr. Thomas Rettig
586 Francis Street
Kent, Ohio 44240

RE: In re Thomas Rettig
No. 99-1 01 60

Dear Mr. Thomas:

The Court today entered the following order in the above-entitled case:

> "The motion of petition for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed.

Very truly yours,
WILLIAM K. SUTER, Clerk

Sig

By_____
Francis J. Lorson
Chief Deputy Clerk

cc: David M. Gormley
Dennis M. Whalen

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

November 27, 2000

Mr. Thomas Rettig
586 Francis Street
Kent, OH 44240

Re: In Re Thomas Rettig
No. 99-10160

Dear Mr. Rettig:

The Court today entered the following order in the above entitled case:

The motion of petitioner for reconsideration of order denying leave to proceed in forma pauperis is denied.

Sincerely,

Sig

_____
William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

March 19, 2001

Mr. Thomas Rettig
586 Francis Street
Kent, OH 44240

Re: In Re Thomas Rettig
No. 00-7895

Dear Mr. Rettig:

The Court today entered the following order in the above entitled case:

The motion of petitioner for leave to proceed in forma pauperis is denied, and the petition for a writ of common law is dismissed. See Rule 39.8. As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See Martin v. District of Columbia Court of Appeals, 506 U.S. 1 (1992) (per curiam). Justice Stevens dissents. See id., at 4, and cases cited therein.

Sincerely,

sig stamp

William K. Suter, Clerk